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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
Petitioner,

v.

THE YAKIMA INDIAN NATION, THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS RESERVATION OF OREGON, THE CONFEDERATED TRIBES OF THE UMATILLA RESERVATION, THE NEZ PERCE TRIBE OF IDAHO,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Indian tribes which are signatories to a treaty with the United States tacitly lost their treaty-protected off-reservation fishing rights by not moving to the reservation created under that treaty, even though the United States permitted their residence upon a different reservation and never abrogated their treaty rights.

2. Whether the court below was precluded from denying the continuing treaty rights of petitioner's constituent tribes by the earlier, contrary decision of the Court of Claims in *The Confederated Tribes of the Colville Reservation v. The Yakima Tribe of Indians of the Yakima Reservation,* 204 Ct. Cl. 868 (1974), upholding their rights under the same treaty.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
TREATIES AND EXECUTIVE ORDER	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. AN INDIAN TRIBE DOES NOT LOSE ITS TREATY-PROTECTED OFF-RESERVATION FISHING RIGHTS BY FAILING TO MOVE TO THE RESERVATION CREATED BY THE TREATY	5
A. The Decision of the Court of Appeals Is Contrary to Rulings of the Lower Courts Affirmed by and Following This Court's Decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*..	5
B. The Court of Appeals Failed To Follow the Well-Settled Rule That Treaty Rights Once Vested Can Be Abrogated Only by Clear Congressional Action	7
C. The Court of Appeals' Decision Is Also Contrary to Congressional Policy	9
II. THE COURT OF APPEALS FAILED TO ACCORD PRECLUSIVE EFFECT TO AN EARIER COURT OF CLAIMS' HOLDING THAT PETITIONER, AS REPRESENTATIVE OF THE TREATY TRIBES, CAN ASSERT RIGHTS UNDER THE 1855 YAKIMA TREATY	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES

	Page
Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294 (1917)	12, 13
Mattz v. Arnet, 412 U.S. 481 (1973)	8
Menominee Tribe v. United States, 391 U.S. 404 (1968)	7, 8, 12
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	9
Nevada v. United States, 463 U.S. 110 (1983)	12, 13
The Confederated Tribes of the Colville Reservation v. The Yakima Tribes of Indians of the Yakima Reservation, 204 Ct. Cl. 868 (1974)	2, 4, 5, 11
United States v. Dion, 476 U.S. 734 (1986)	7, 8
United States v. Oregon, 29 F.3d 481 (9th Cir.), *as amended*, 43 F.3d 1284 (9th Cir. 1994)	2, 9
United States v. Oregon and Confederated Tribes of the Colville Reservation, Plaintiff-Intervenor, 787 F. Supp. 1557 (D. Or. 1992), *aff'd*, 29 F.3d 481 (9th Cir.), *as amended*, 43 F.3d 1284 (9th Cir. 1994)	2, 3, 8, 9
United States v. Washington, 626 F. Supp. 1405 (W.D. Wash. 1985)	7
United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1978)	7
United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976)	6
United States v. Winans, 198 U.S. 371 (1905)	12
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)	2, 4, 6, 11

STATUTES

25 U.S.C. §§ 461 *et seq.*	4, 10
25 U.S.C. § 476	10
25 U.S.C. § 478b	4, 10
25 U.S.C. § 609	11
28 U.S.C. § 1254(1)	3
28 U.S.C. § 1331	3

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
The Treaty of June 9, 1855, 12 Stat. 951	3, 5, 6
Treaty of June 11, 1855, 12 Stat. 957	3, 5, 6
Executive Order of April 8, 1872	3

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THE YAKIMA INDIAN NATION, THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS RESERVATION OF OREGON, THE CONFEDERATED TRIBES OF THE UMATILLA RESERVATION, THE NEZ PERCE TRIBE OF IDAHO,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Confederated Tribes of the Colville Reservation ("Colville Tribes"), is a federally recognized Indian Tribe. Six of its eleven constituent tribes signed separate treaties with the United States reserving off-reservation fishing rights. These treaty rights were granted as part of the consideration for land ceded to the United States. The tribes, however, did not settle

on the reservations established in their treaties, but with the approval of the United States settled on reservations nearer their aboriginal lands. The off-reservation fishing rights of tribes in the identical situation were recognized in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). In *The Confederated Tribes of the Colville Reservation v. The Yakima Tribe of Indians of the Yakima Reservation*, 204 Ct. Cl. 868 (1974), the Court of Claims held that the treaty rights of these same constituent tribes remain in effect and that the Colville Tribes is their present day representative. The Colville Tribes seek certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit which, contrary to the Court of Claims' decision, and to the treatment of other such treaty tribes in the Northwest, held that these constituent tribes lost their treaty protected fishing rights by moving to the Colville Reservation.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported as *United States v. Oregon*, 29 F.3d 481 (1994) (App. A, pp. 1a-12a) and 43 F.3d 1284 (1994) (amending the original opinion) (App. B, pp. 13a-14a). The opinion of the District Court is reported as *United States v. Oregon and Confederated Tribes of the Colville Reservation, Plaintiff-Intervenor*, 787 F. Supp. 1557 (D. Or. 1992) (App. C, pp. 15a-65a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered June 23, 1994. A Petition for Rehearing and Petition for Rehearing *en banc* was timely filed July 29, 1994. The Petition for Rehearing was de-

[1] Parties to the case below not appearing in the caption are: the United States, the States of Washington, Oregon and Idaho, and the Shoshone-Bannock Tribes of Idaho. None participated in the appeal.

nied on December 23, 1994 (App. D, pp. 66a-67a). The original opinion was amended December 28, 1994.

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATIES AND EXECUTIVE ORDER

The Treaties and Executive Order at issue in this case are set out in the Appendix. They include:

1. The Treaty of June 9, 1855, 12 Stat. 951 (App. E, pp. 68a-75a);
2. The Treaty of June 11, 1855, 12 Stat. 957 (App. F, pp. 76a-84a); and
3. The Executive Order of April 8, 1872 (App. G, pp. 85a-87a).

STATEMENT OF THE CASE

This case concerns the treaty fishing rights of the Wenatchi, Chelan, Columbia, Entiat, and Palus tribes, and the Chief Joseph Band of Nez Perce (hereafter collectively "Treaty tribes"),[2] each a recognized party to a treaty in which it reserved the continuing right to fish off-reservation as a major part of the consideration for giving up its aboriginal lands.[3] The jurisdiction of the District Court rests upon 28 U.S.C. § 1331, jurisdiction over civil actions arising under the Constitution, laws or treaties of the United States.

Here the Treaty tribes with the approval of the United States, or in some cases under duress from the United States, were placed on the Colville Reservation. In 1938,

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[2] The Wenatchi, Chelan, Columbia, Entiat, and Palus tribes were each party to the Treaty of June 9, 1855 at Walla Walla (App. E, pp. 68a-75a), and the Chief Joseph Band of Nez Perce was a party to the Nez Perce Treaty of June 11, 1855 (App. F, pp. 76a-84a).

[3] *United States v. Oregon*, 787 F. Supp. 1557 (D. Or. 1992), *aff'd*, 29 F.3d 481 (9th Cir.), *as amended*, 43 F.3d 1284 (9th Cir. 1994) (App. C, pp. 15a-65a; App. A, pp. 1a-12a; App. B, pp. 13a-14a).

these tribes, and other tribes also allowed to move to the Colville Reservation, formed the current Confederated Tribes of the Colville Reservation.

A letter from the United States to the tribes at that time assured the tribes that the new Colville Confederacy would not diminish the individual tribe's treaty rights. (E.R. 58).[4] The United States' assurances were consistent with the contemporaneous Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.*, which made clear that reorganization under that Act would not "abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe. . ." 25 U.S.C. § 478b.

The path taken by the Treaty tribes that came to the Colville Reservation was not unlike the path taken by numerous tribes throughout the Pacific Northwest, including many of those whose fishing rights were recognized by this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). Additionally, the Court of Claims has held specifically that the treaty rights of these very tribes were not lost by moving to the Colville Reservation, and that the Colville Tribe is the proper party to represent the Treaty tribes. *The Confederated Tribes of the Colville Reservation v. The Yakima Tribe of the Indians at the Yakima Reservation*, 204 Ct. Cl. 868, 870-71 (1974). Only in this case has a court found that the failure to move to and affiliate with the tribes on the reservation identified in the treaty was grounds for the abrogation of treaty rights that formed part of the consideration for cessions of land.

The decision below misapplies and destablizes the law in situations that arise over and over again—protection of treaty rights of constituent tribes when more than one tribe is put on the same reservation. The Court should grant a writ of certiorari to review the critical impact of this decision.

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[4] Extract of Record, Court of Appeals, p. 58 (App. H, p. 88a).

REASONS FOR GRANTING THE WRIT

This case presents two questions that require review by this Court, both of which were wrongly decided by the Court of Appeals:

(1) a question of treaty violation—whether Indian tribes which are signatories to a treaty with the United States lose their treaty-protected off-reservation fishing rights, *sub silentio*, by failing to move to the reservation created by the treaty, notwithstanding this Court's repeated holdings that treaty rights cannot be lightly abrogated; and (2) a question of issue preclusion—whether the decision of the Court of Claims in *The Confederated Tribes of the Colville Reservation v. The Yakima Tribe of Indians of the Yakima Reservation*, 204 Ct. Cl. 868 (1974), upholding petitioner's continuing rights, as the representative of its constituent tribes, to compensation for land ceded under the Yakima Treaty of June 9, 1855 (App. E, pp. 68a-75a) is binding upon the Court of Appeals in considering petitioner's off-reservation fishing rights under the same 1855 Treaty.

I. AN INDIAN TRIBE DOES NOT LOSE ITS TREATY-PROTECTED OFF-RESERVATION FISHING RIGHTS BY FAILING TO MOVE TO THE RESERVATION CREATED BY THE TREATY.

A. The Decision of the Court of Appeals Is Contrary to Rulings of the Lower Courts Affirmed by and Following This Court's Decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*

The parties in this case have stipulated that the Wenatchi, Entiat, Chelan, Columbia, and Palus tribes were each parties to the 1855 Yakima Treaty (App. E, pp. 68a-75a), and that Old Joseph, leader of the Wal?wama band, signed the 1855 Nez Perce Treaty (App. F, pp. 76a-84a). Both of the 1855 treaties recognized that their tribal signatories possessed off-reservation

fishing rights. *See* Treaty of June 9, 1855, Art. 3 (App. E, p. 70a); Treaty of June 11, 1855, Art. 3 (App. F, p. 78a). There is thus no dispute that, as of 1855, petitioner's constituent tribes (the Treaty tribes) did possess treaty-protected off-reservation fishing rights. The court below concluded, however, that those treaty rights were lost, *sub silentio*, when the Treaty tribes failed to move to the reservations established under their respective treaties, continued to maintain their separate identities and eventually settled upon the Colville Reservation with the permission and, indeed, active encouragement of the United States.

In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court defined with particularity the law to be applied in determining the present day status of tribes with off-reservation treaty fishing rights. *Fishing Vessel Ass'n* addressed the treaty off-reservation fishing rights of the many tribes that were party to five separate treaties covering the Puget Sound region of Washington State and areas of the Washington coast. This Court declared that, "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . ." *Id.* at 690.

Fishing Vessel Ass'n ultimately affirmed the decision in *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), in which the Ninth Circuit consistently held that treaty fishing rights were not abrogated because various tribes did not move to the reservations set aside in a treaty. *Washington*, 520 F.2d at 692-93. For example, the Stillaguamish and Upper Skagit Tribes each was recognized as having continuing treaty fishing rights, yet neither moved to the reservation set aside for them in the treaty. *Id.* at 692. Not only were the continuing treaty rights of the Sauk-Suiattle, Stillaguamish and Upper Skagit recognized, but also the treaty fishing rights of the confederated tribes,

different from those listed in the treaties, that occupied the reservations identified in the treaties. *United States v. Washington,* 459 F. Supp. 1020, 1039-41 (W.D. Wash. 1978).

The rule affirmed in *Fishing Vessel Ass'n* has been followed by the lower courts. The history of the Clallam bands provides a case in point. The Clallam bands were to move to the Skokomish reservation. Because the Skokomish reservation was "far removed from the Clallam villages" none of the Clallam bands would move there. In time, three different and separate reservations, or communities, were established, one for each of the three Clallam bands. *United States v. Washington,* 626 F. Supp. 1405, 1432-34 (W.D. Wash. 1985).[5] None lost treaty fishing rights.

The decision below places these decisions in jeopardy. If the decision of the Court of Appeals is allowed to stand, tribes will not be secure in their treaty fishing rights. The court in *United States v. Washington* has continuing jurisdiction. A decision in this case will affect rights that continue to be before a lower court, always subject to modification in light of a change in the law.

B. The Court of Appeals Failed To Follow the Well-Settled Rule That Treaty Rights Once Vested Can Be Abrogated Only by Clear Congressional Action.

This Court's decision in *Fishing Vessel Ass'n* was consistent with the well-settled rule that an intention to abrogate treaty rights must be "clear and plain." *United States v. Dion,* 476 U.S. 734, 738 (1986). Where there is no clear statutory language supporting abrogation, this Court has been reluctant to find an abrogation of treaty rights. *Menominee Tribe v. United States,* 391 U.S.

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[5] The Wenatchi, Chelan, Columbia and Entiat also found that the reservation set aside for them was far removed from their homelands. Like the Clallams, these tribes sought and obtained from the United States new homes nearer to their aboriginal lands.

404, 412-13 (1968). " 'The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' " *Id.* at 413 (citation omitted); *see also Mattz v. Arnet*, 412 U.S. 481, 504-06 (1973) (Extinguishment of reservation). This Court has summed up its careful concern for the preservation of treaty rights by noting, "Indian treaty rights are too fundamental to be easily cast aside." *Dion*, 476 U.S. at 739.

In examining the intent of Congress to abrogate, this Court looks at various indicia. Congressional intent can be seen through express congressional declarations, or from the circumstances surrounding the passage of an act of Congress, or in appropriate cases from the legislative history of the act. *Id.* Whatever the path,

> What is essential is clear evidence that Congress actually considered the conflict between the intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.

Id. at 739-40.

In this case there is not a single act of Congress or statement from any United States official that would support abrogation. The 1855 treaties in which the off-reservation fishing rights were reserved are silent as to whether the Treaty tribes were required to remove to the reservations set aside in the treaties. No subsequent treaty or agreements entered into by any of the Treaty tribes speaks to treaty off-reservation fishing rights, let alone supports abrogation. The parties have stipulated that, although the Nez Perce signed a treaty in 1863 that ceded 90% of their 1855 Reservation because it contained no provision affecting their off-reservation fishing rights, it had no affect on those previously reserved rights. *Oregon*, 787 F. Supp. at 1574 (App. C, pp. 48a-50a). The other Treaty tribes (except Palus) signed agreements in 1879 and 1883 establishing a new home. Those agree-

ments also were silent as to treaty off-reservation fishing rights. *Oregon*, 29 F.3d at 485-86 (App. A, pp. 8a-10a). Treaty rights cannot be lost through silence. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982).

The Court of Appeals' decision plays a cruel joke on the Wenatchi, Chelan, Entiat, Columbia, and Palus tribes. Specifically, the court below held that the treaty fishing rights of these tribes were lost because they failed to maintain political cohesion with the entity on the reservation identified in the treaty. *Id.* at 485-86 (App. A, pp. 8a-10a). Yet, all the courts below, including the Court of Appeals, have found that the entity allegedly created by the treaty never came into existence. *Oregon*, 787 F. Supp. at 1561 (App. C, p. 24a); *Oregon*, 29 F.3d at 485 (App. A, pp. 8a-10a). Thus, these tribes could not have maintained cohesion with it even if they wanted to. The Yakima Tribe that now governs the Yakima Reservation was formally reconstituted in 1974, long after the movement of the Treaty tribes to the Colville Reservation and their governmentally approved confederation. *Id.* at 486 (App. A, pp. 9a-10a).

The Court of Appeals' decision represents a total departure from the rules of treaty implementation enunciated by this Court. It establishes a new and unprecedented rule that rights reserved in treaties can be lost by the failure of a treaty tribe to move to a reservation identified in the treaty, without more and without any Congressional or United States action to support such a result.

C. The Court of Appeals' Decision Is Also Contrary to Congressional Policy.

The fundamental purpose of the treaty making process in the Pacific Northwest was to clear the way for non-Indian settlement. The prime objective was to move the tribes to reservations—any reservations—to make room for the ever advancing settlers. Separate tribes were

often settled on a single reservation. By the 1930s numerous failures of the United States Indian policy resulted in a major shift toward greater tribal self-determination. The Wheeler-Howard Act, 25 U.S.C. §§ 461 *et seq.*, commonly referred to as the Indian Reorganization Act ("IRA"), provided that any tribe or any group of tribes on a single reservation could establish a new government under the terms of the Act. 25 U.S.C. § 476.

Since tribes were concerned that such confederations or new governments might result in a loss of treaty rights, Congress expressly provided in 25 U.S.C. § 478b that:

> [n]othing in the Act . . . shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe where such tribe voted not to exclude itself from the application of said Act.

This is the policy of the United States in the reorganization of Indian tribes. The Colville Tribes did not organize under the IRA, but in 1938 formed their confederation, achieving the same result. In December 1937, the United States assured the Colville Tribes that their new Constitution "does not interfere with any of your treaty or constitutional rights." (E.R. 58, App. H, p. 88a).

Once Congress has set a policy, it is the obligation of the courts to follow that policy. Here the Court of Appeals not only ignored the policy, but reached a conclusion exactly the opposite of that dictated by Congress, and contemporaneously expressed to the Colville Tribes.

II. THE COURT OF APPEALS FAILED TO ACCORD PRECLUSIVE EFFECT TO AN EARLIER COURT OF CLAIMS' HOLDING THAT PETITIONER, AS REPRESENTATIVE OF THE TREATY TRIBES, CAN ASSERT RIGHTS UNDER THE 1855 YAKIMA TREATY.

A central error of the Court of Appeals is its failure to give full preclusive effect to the decision of the Court

of Claims which earlier had determined petitioner to be the present day representative of the Wenatchi, Chelan, Entiat, Columbia, and Palus tribes and that the rights of those tribes under the 1855 Yakima Treaty to full consideration for land ceded had not been lost. *The Confederated Tribes of the Colville Reservation,* 204 Ct. Cl. at 870.

Pursuant to a special act of Congress, 25 U.S.C. § 609, the Colville and Yakima tribes were given the right to litigate before the Court of Claims which tribe presently represents the aboriginal Wenatchi, Chelan, Columbia, Entiat, and Palus tribes for purposes of the 1855 Treaty. The Court of Claims was to determine which modern tribe (Colville or Yakima) was the tribe that was entitled to the additional compensation owing to the aboriginal tribes as a result of the taking of aboriginal lands under the treaty.

The Court of Claims determined that it was petitioner that was the modern, federally recognized tribe that today represents the interests of the Wenatchi, Chelan, Columbia, Entiat, and Palus, and recognized the tribal nature of the claim. *Id.* All of the additional compensation owing with respect to lands ceded in 1855 by the Wenatchi, Chelan, Columbia, Entiat, and Palus was awarded to the Colville Tribes as the modern tribe that represented the tribal interest of these tribes. The Court ruled:

> Justice and fairness do not require us to disregard the group nature of the claim, the status of the plaintiff as the current tribal representative of the five named groups, so as to increase defendant's award because its membership happens to include a number of descendants of Indians who belonged to the groups now represented by plaintiff.

Id.

The treaty right to fish off-reservation is as much a part of the consideration retained or received by the tribes for the cession of lands as is the money received. *Fishing*

Vessel Ass'n, 443 U.S. at 676-78 ("The money paid was insufficient to compensate for lands taken.") Indeed, the fishing right is an incident of property ownership—an easement in the lands ceded. *United States v. Winans*, 198 U.S. 371, 381 (1905). The Treaty tribes are entitled to all of the consideration that was promised in the treaties. Monetary compensation for the land ceded is one part of what was promised. Off-reservation fishing rights is another form of compensation provided by the same treaty. Once the Court of Claims determined that the Colville Tribes represent the Wenatchi, Chelan, Entiat, Columbia, and Palus for treaty purposes, and that the Treaty was still enforceable, that result was binding on subsequent courts when considering the right to other consideration given or reserved by the Treaty tribes under the same treaty.[6]

The doctrines of collateral estoppel and *res judicata* guard against just such a result as was reached in this case: repetitive litigation between the same parties on an issue previously resolved between them. *See Nevada v. United States*, 463 U.S. 110 (1983); *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294 (1917).

The issue in the Court of Claims was compensation owed to the tribes as a result of the cession of lands

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[6] The decision of the Court of Appeals taken in conjunction with the Court of Claims' opinion exposes the United States to serious financial liability. It is clear that it is the Colville Tribes, as the present day successor to the Wenatchi, Chelan, Entiat, Columbia, and Palus tribes, that is entitled to the consideration for the cession of lands to the United States. The Court of Appeals has ruled that a significant portion of that consideration has been taken from the Treaty tribes as a result of their permitted or forced confederation on the Colville Reservation. Obviously, that taking is subject to compensation under the Fifth Amendment. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). The correct course for this Court to take is the same as it took in *Menominee Tribe v. United States* where the Court held that the rights reserved remain unaffected and enforceable today, and thus do not establish a claim against the United States.

under the treaty. The issue in this case is the ability to utilize rights reserved as part of the consideration for the same cession of lands. Both cases dealt with the consideration given or reserved in the treaty. Whether the consideration is money for lands or reserved fishing rights, both are part of what the tribes contracted for in 1855. The Court of Claims having entered a final judgment in favor of the Colville Tribes affirming that it and not the Yakima tribe is the political successor to the rights under the treaty, the Court of Appeals for the Ninth Circuit should not have held to the contrary. *Nevada*, 463 U.S. at 128-31; *see also Hart Steel Co.*, 244 U.S. at 297-98.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 22, 1994

APPENDICES

BEST AVAILABLE COPY

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-35150

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
and

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON; CONFEDERATED TRIBES OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION; NEZ PERCE TRIBE; and the SHOSHONE-BANNOCK TRIBES,
Plaintiffs-Intervenors-Appellees,
v.

STATE OF OREGON; STATE OF WASHINGTON,
Defendants,
v.

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
Intervenor-Appellant.

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted Aug. 31, 1993
Decided June 23, 1994

Before: BROWNING, SCHROEDER and HALL, Circuit Judges.

SCHROEDER, Circuit Judge:

Appellant is the Confederated Tribes of the Colville Reservation ("Colville"), a confederation of eleven Indian tribes. In 1989, Colville sought to intervene in the underlying litigation that had begun in 1968 to determine Indian off-reservation fishing rights on the Columbia River and its tributaries. In its intervention petition, Colville contended that six of its constituent tribes retained fishing rights as a result of two 1855 treaties. The motion was opposed by other tribes who feared encroachment on their own treaty fishing rights. After considering voluminous exhibits, stipulations and evidence presented during a three-day court trial, the district court denied Colville's intervention motion, finding that Colville could not assert treaty fishing rights reserved to its constituent tribes. 787 F.Supp. 1557. Colville now appeals.

BACKGROUND

The United States initiated the underlying litigation in 1968 on behalf of certain Indian tribes in Oregon and against the State of Oregon to define, at least in part, the Indians' treaty rights to take fish at "all usual and accustomed places" on the Columbia River and its tributaries.[1] The United States takes no position in this appeal.

The controversy before us is part of long-running litigation in the Pacific Northwest regarding Indian rights in both Oregon and Washington under a number of treaties. The historical background of the treaties in the Pacific Northwest is set forth in greater detail in *United States v. Washington,* 384 F.Supp. 312, 334 (W.D.Wash.1974), *aff'd* 520 F.2d 676 (9th Cir.1975)

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[1] The underlying litigation was consolidated with *Sohappy v. Smith,* in which individual Indians asserted the same claims. *Sohappy v. Smith,* 302 F.Supp. 899, 903-04 (D.Or.1969).

("*Washington I*"), *cert. denied*, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976), the seminal and most comprehensive opinion in what is now a long line of district and circuit court opinions.

The appellees are the Yakima Indian Nation, The Confederated Tribes and Bands of the Warm Springs Reservation of Oregon, The Confederated Tribes of the Umatilla Reservation and the Nez Perce Tribe of Idaho. These four tribes intervened in the litigation as plaintiffs in 1969. The district court in 1969 ruled that these tribes had treaty rights to a "fair share of Columbia River salmon." *See Sohappy v. Smith*, 302 F.Supp. at 911-12. In 1974 and 1983, the states of Washington and Idaho, respectively, intervened. The district court conducted numerous proceedings that led to the adoption in 1988 of a comprehensive fish management plan.

In 1989, one year after approval of the management plan, Colville sought to intervene. Colville has not explained why it waited over twenty years after *United States v. Oregon* was initiated and why it did not seek to intervene while the district court was considering the comprehensive management plan adopted in 1988. In its intervention petition Colville asserted that it was the legal representative of the Wenatchi, Entiat, Chelan, Columbia, and Palus Tribes and the Chief Joseph Band of Nez Perce. According to Colville, the Wenatchi, Entiat, Chelan, Columbia, and Palus Tribes were parties to the treaty of June 9, 1855, known as the "Yakima Treaty," and the Chief Joseph Band of Nez Perce was party to the Treaty of June 11, 1855 known as the "Nez Perce Treaty." Under both of these treaties, tribes ceded traditional lands to the United States but reserved off-reservation fishing rights on the Columbia River.

There has been some confusion in this intervention proceeding concerning the scope of Colville's claim. The district court rested its decision in part on its conclusion that Colville's intent was to assert off-reservation fishing

rights on behalf of all of its members and all eleven of its constituent tribes, not merely the six tribes who claim descent from treaty signers. At oral argument in this appeal, Colville clarified that it was asserting only the rights of the six constituent treaty tribes, and that accordingly, only members of those tribes would be permitted to fish. In the proceedings here under review, Colville therefore maintains that six of the constituent tribes of which it is the legal representative have off-reservation fishing rights traceable to rights accorded tribes signatory to the treaties.

With that clarification, appellants' principal argument in the appeal rests on two fundamental premises. Colville contends that because the constituent tribes trace their lineage to groups whose representatives signed the Yakima and Nez Perce Treaties in 1855, the constituent tribes retained treaty fishing rights. In support of this contention, Colville points out that the government recognized the constituent groups as tribal entities when they became part of the government of the Colville Confederacy in 1938. Colville contends further that any rights belonging to constituent tribes could not have been extinguished by joining the Colville Confederacy because confederation under the Indian Reorganization Act of 1938 does not abrogate the treaty rights of the confederating tribes. 25 U.S.C. § 476. Thus, Colville argues that it may assert and administer the rights that belong to its constituent tribes.

It is not disputed that Colville is the only entity that can legally act on behalf of members of the Confederated Tribes, and we agree with Colville that if the constituent tribes retained treaty fishing rights, Colville may properly assert these rights. The critical issue is therefore whether the constituent tribes had treaty fishing rights when they moved to the Colville Reservation and joined the Colville Confederacy in 1938.

DISCUSSION

The two treaties involved in this litigation were among several treaties that were signed and negotiated by Governer Stevens in the 1850s in a hasty effort to clear land occupied by Indians for development by settlers. The treaties purported to relocate Indians to reservations while recognizing their nomadic subsistence culture by reserving off-reservation fishing rights. *Washington I,* 520 F.2d at 682-83. Governor Stevens, under pressure to extinguish Indian title to all lands, consolidated small tribes or bands into larger tribal entities for the purposes of the treaties. As the district court found, "Indian culture at the time of the Stevens treaties was vastly more complex than the treaties recognized." Further, "to the extent that Stevens made any effort . . . to group traditional tribal entities for the purposes of negotiation, his efforts, as reflected in the treaties produced, were woefully inaccurate." The inadequacy of the treaties is further exacerbated by the fact that the Indians signing the treaties generally did not speak English, and the Indian argot into which the treaty provisions were translated was inadequate to convey the meaning of the treaties. *Washington I,* 520 F.2d at 683.

This court recognized in *Washington I* that the treaty tribes were constructed arbitrarily and in haste by Governor Stevens "for his convenience in negotiating the treaties." 520 F.2d at 688. "Nevertheless, each tribe was understood to be an entity for the purpose of each treaty." *Id.* As we explained in *Washington I*, "[e]ach tribe bargained as an entity for rights which were to be enjoyed communally." *Id.* Our court has thus recognized the tribes created by Governor Stevens as the entities receiving treaty rights.

Rights under a treaty vest with the tribe at the time of the signing of the treaty, *Washington I*, 520 F.2d at 692, but Indians later asserting treaty rights must establish that their group has preserved its tribal status. *United States v. Washington*, 641 F.2d 1368, 1372-73

(9th Cir.1981) ("*Washington II*"), *cert. denied*, 454 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982). The group seeking to exercise treaty rights must show that it has maintained an "organized tribal structure," which in turn can be shown by establishing that "some defining characteristic of the original tribe persists in an evolving tribal community." *Id.* at 1372-73.

In a series of decisions considering treaty claims of contemporary groups, we have looked to whether tribal continuity has been maintained. In *Washington II*, we considered the claim of a group seeking to assert the treaty fishing rights accorded the Samish Tribe. We held the groups could not assert such rights, basing our holding upon the district court's finding that the appellants "had not functioned since treaty times as 'continuous, separate, distinct and cohesive Indian cultural or political communities.' " *Id.* at 1373 (quoting *United States v. Washington*, 476 F.Supp. 1101, 1105-10 (W.D.Wash. 1979)).

In *United States v. Suquamish*, 901 F.2d 772 (9th Cir.1990), we considered the treaty tribe status of a group of the Suquamish who claimed to be the successor to rights originally granted the Duwamish Tribe. We held in that case that a showing of common ancestry was not sufficient and that actual merger or combination of tribal or political structure was required. *Id.* at 776. Because the evidence was insufficient to show a cohesive communal decision by the Duwamish to unite with the Suquamish, we concluded that the Suquamish Tribe could not successfully claim that it was a " 'political successor' " to the treaty time Duwamish Tribe. *Id.* at 777.

Colville contends that the *Suquamish* case is distinguishable because Colville is not claiming treaty rights under a successor or merger theory, but rather is asserting rights on behalf of the six tribes who were represented by treaty signatories. Colville distinguishes the Samish situation from theirs because the Samish were no longer

functioning as a tribal entity at the time they asserted treaty rights, whereas the constituent tribes in this case were recognized as tribal entities when they entered the Colville Reservation and continue to maintain their defining characteristics as tribes. The flaw in appellant's efforts is that the constituent tribes in this case have never been recognized as tribes having treaty fishing rights under the 1855 treaties. Our law requires that appellants must trace a continuous and defining political or cultural characteristic to the entity that was granted the treaty rights.

In this regard, our decision in *Washington I* concerning the treaty tribe status of the Muckleshoots is instructive. *See* 520 F.2d at 692-93. Indians who had signed earlier treaties came together to inhabit the Muckleshoot Reservation and were recognized continually thereafter by the government as the Muckleshoot Tribe. We held that by merging into the Muckleshoot Tribe, which was created two years after the treaties were signed, the treaty tribes did not lose their treaty rights. *Id.* We affirmed the district court's recognition of the Muckleshoots as the successor in interest to its constituent treaty tribes because of the clear political continuity of its constituents. The crucial factor which supported our analysis regarding the Muckleshoots, and which distinguishes them from the tribes before us, was that the Muckleshoot Tribe had continuously asserted treaty fishing rights and had always been recognized as the entity possessing these rights. Thus, the continuity of the tribal entity possessing the treaty rights was determinative.

The essential contention of the appellees is that the six relevant constituent tribes of the Colville Confederacy did not maintain the cultural and political identity in the years following 1855 that would be necessary to establish entitlement to rights reserved to treaty tribes. Our own decision in this case must be guided by the factual stipulations of the parties, the facts found by the

district court after the evidentiary hearing, and standards established by courts in this circuit dealing with the claims of entities seeking to be recognized as treaty tribes.

The record shows that the constituent tribes in 1938 had identifiable cultural and political characteristics that led to their recognition as constituent tribes of the Colville Confederacy. The critical issue, however, is whether the tribes have shown that they have maintained political cohesion with the tribal entities created by the treaties and receiving fishing rights. For the reasons discussed below, we conclude that they have not. We therefore affirm. Because the case involves two different treaties and two different sets of claimants, we deal separately with each.

The Yakima Treaty:

The Wenatchi, Entiat, Chelan, Columbia, and Palus Tribes

The parties have stipulated that the Wenatchi, Entiat, Chelan, Columbia, and Palus tribes were each parties to the Yakima Treaty of June 9, 1855. The Yakima Treaty of 1855 envisioned the creation of a successor tribe, a "Yakima Nation" composed of all of the people represented by the signatories to the Treaty. The government intended all Indians represented by signatories to the Yakima Treaty to move to the newly established Yakima Reservation and comprise the Yakima Nation. The "Yakima Nation" that actually came into existence, however, was not the same as that originally envisioned. It was composed solely of the Indians who moved to the reservation established by the 1855 Yakima Treaty. The five tribes with which we are concerned here did not move to the Yakima Reservation, but carried out a nomadic existence and subsequently negotiated independent treaties with the government in 1879.

Chief Moses was the Chief of the Columbia and spokesperson for the Wenatchi, Entiat, Columbia, and

Chelan. The district court found that Moses was not present at the Yakima Treaty negotiations in 1855 and that Moses was among those who refused to move onto the Yakima Reservation. Instead, Moses "negotiated directly with federal authorities in an attempt to gain a separate reservation for his people" that would encompass the tribe's traditional territories. In the 1879 treaty, the United States agreed to create a separate reservation for Moses called the "Moses Columbia Reservation," which included portions of the aboriginal lands of the Wenatchi, Entiat, Columbia and Chelan.

Moses and the United States returned to the bargaining table in 1883 as a result of mutual dissatisfaction with the terms of the 1879 Columbia Reservation treaty. They agreed to restore the reservation to the public domain and to let Moses and his people relocate to the Colville Reservation. Many of Moses' followers voluntarily relocated to Colville, although the Chelan tribe was moved there by military force in 1890. Neither the 1879 treaty reserving the Columbia Reservation nor the 1883 Colville agreement incorporated or referenced the off-reservation fishing rights that had been reserved by the 1855 Yakima Treaty.

At the time of the 1855 Yakima Treaty, the Palus tribe consisted of a distinct ethnic group of several villages located along the Snake River. The Palus were loosely connected and did not have a cohesive political structure. One Palus leader signed the Yakima Treaty as the representative of the Palus, but the Palus refused to move onto the Yakima Reservation. In the 1880s, a number of Palus began to relocate onto the Colville Reservation.

The present Yakima Nation was recomposed in 1974 and has exercised treaty rights as a successor to the entities that signed the original 1855 Yakima Treaty. As Judge Boldt explained in *United States v. Washington*, 384 F.Supp. at 381, "the Yakima Indians have continued

to assert their off-reservation fishing rights, including fisheries in the case area." The Yakima Nation has thus continually exercised the off-reservation fishing rights and continued the fishing culture of the original signatories to the 1855 treaty.

The constituent tribes with which we are concerned have not. The district court in this case made findings relating to the history of the bands who now seek to trace their cultural and political lineage to the tribes that signed the 1855 treaty. These findings reflect that the tribes, prior to being subsumed in the Colville Confederacy, were separate bands who disengaged from the Yakima Nation by refusing to relocate to the reservation established by the 1855 treaty. As the district court found, "Moses and his followers deliberately sought to separate themselves from the 'Yakima Nation' identified in the treaty." We therefore agree with the result reached by the district court that the decendants of the Wenatchi, Entiat, Columbia, Chelan, and Palus tribes now living on the Colville Reservation are not entitled to exercise treaty fishing rights. We reach this result because we conclude that the constituent tribes when they entered the Colville Confederacy did not retain any treaty fishing rights accorded signatories to the 1855 treaty. We do not agree with the district court that even if the constituent tribes had retained rights, the rights were extinguished by merger into the Colville Confederacy. Nor do we reach the Yakima Tribe's contention that any rights these tribes had were extinguished by subsequent negotiations by Chief Moses of treaties that did not mention fishing rights. Rather, we conclude that by deliberately separating from the Yakima Nation, these tribes failed to maintain political cohesion with the tribal entity in which the treaty fishing rights are vested.

The Nez Perce Treaty:

The Chief Joseph Band of Nez Perce

The parties have stipulated that at the time of the 1855 treaty, the Nez Perce political organization consisted of villages, bands, band groups, and the tribe. The Nez Perce did not recognize one particular leader of the tribe; rather, multiple leaders exercised authority over various functions.

The 1855 Nez Perce Treaty was signed by 54 tribal leaders on behalf of the Nez Perce tribe, including Old Joseph, leader of the Wallawana band. The Treaty extinguished title to some 5.5 million acres in the Pacific Northwest, granted the tribe a reservation of approximately 7.5 million acres, and reserved to the tribe the right to continue fishing at all usual and accustomed places.

In 1863, the United States negotiated another treaty with the Nez Perce, forcing the Nez Perce to relinquish approximately 90% of the original reservation. The 1863 treaty was silent as to fishing rights. Fifty-one Nez Perce leaders signed the 1863 treaty on behalf of the tribe.

The Chief Joseph Band refused to sign the 1863 treaty. The Chief Joseph Band continued living on their traditional lands until the Nez Perce War in 1877. Following the war, Chief Joseph surrendered, and the surviving members of the band were moved to Kansas and then to Oklahoma. Beginning in 1855, the Chief Joseph Band was allowed to return to the Northwest. Eventually, 150 of the surviving 268 members of the Chief Joseph Band settled on the Colville Reservation.

The district court found that the tribal entity reflected in the Nez Perce Treaty of 1855 is the present day Nez Perce Tribe of Idaho. The fishing rights were granted to the Nez Perce Tribe to be enjoyed communally. *See Washington I*, 520 F.2d at 688. The Nez Perce Tribe

has continually been recognized as the entity reflected in the 1855 treaty and in which the fishing rights were vested. *See The Nez Perce Tribe of Indians v. United States,* 18 Ind.Cl.Comm. 1, 88 (1967). As the Nez Perce Tribe correctly argues, the fishing rights belong to the tribal entity as a whole, not to its component bands individually.

The district court found that the Chief Joseph Band withdrew from the Nez Perce Tribe at least as early as 1863 when it refused to sign the 1863 treaty or move to the Nez Perce Reservation. Because the Chief Joseph Band has not maintained political cohesion with the Nez Perce Tribe, the Chief Joseph Band cannot exercise the treaty rights which were granted to the Nez Perce Tribe. Thus, regardless of whether the Chief Joseph Band moved to Colville as a tribe and has maintained its own defining tribal characteristics, we agree with the result reached by the district court that the descendants of the Chief Joseph Band currently living on Colville cannot assert treaty fishing rights.

CONCLUSION

The order of the district court denying Colville's motion to intervene is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-35150

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON; CONFEDERATED TRIBES OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION; NEZ PERCE TRIBE; AND THE SHOSHONE-BANNOCK TRIBES,
Plaintiffs-Intervenors-Appellees,

v.

STATE OF OREGON; STATE OF WASHINGTON,
Defendants,

v.

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
Plaintiff-Intervenor-Appellant.

Decided Dec. 28, 1994

Before: BROWNING, SCHROEDER, and HALL, Circuit Judges.

ORDER

The opinion filed June 23, 1994, 29 F.3d 481, is amended as follows: Insert the following footnote at 29 F.3d page 485, just after the sentence reading "The five tribes with which we are concerned did not move to the Yakima Reservation, but carried out a nomadic existence and subsequently negotiated independent treaties with the government in 1879."

> Failure to move onto the reservation is not the determinative factor in deciding whether a group has retained treaty rights. Rather, it is only one consideration relevant to an essentially factual inquiry—*i.e.*, whether a group claiming treaty rights has maintained sufficient political continuity with those who signed the treaty that it may fairly be called the same tribe. *See Washington II*, 641 F.2d at 1372-73.

Delete the following two sentences from 29 F.3d page 485: "The crucial factor which supported our analysis regarding the Muckleshoots, and which distinguishes them from the tribes before us, was that the Muckleshoot Tribe had continuously asserted treaty fishing rights and had always been recognized as the entity possessing these rights. Thus, the continuity of the tribal entity possessing the treaty rights was determinative."

APPENDIX C

UNITED STATES DISTRICT COURT
D. OREGON

Civ. No. 68-513-MA

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

v.

STATE OF OREGON, *et al.*,
Defendants,

and

CONFEDERATED TRIBES OF THE
COLVILLE RESERVATION,
Plaintiff-Intervenor.

March 16, 1992

AMENDED OPINION [1]

MARSH, District Judge.

Plaintiff-intervenor Confederated Tribes of the Colville Reseravtion ("Colville") filed a complaint in intervention seeking injunctive relief and a declaration that it is the successor in interest to the Wenatchi, Entiat, Chelan,

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[1] A special note of appreciation to Mr. George Dysart, retired counsel for the United States and a former active participant in *United States v. Oregon* for many years, for his review of this decision and notes of technical corrections.

Columbia, Palus and the Chief Joseph Band of Nez Perce Indians, and as such, it is entitled to exercise Columbia River off-reservation fishing rights reserved by those tribes in the Treaty at the Walla Walla Valley on June 9, 1855, 12 Stat. 951, II Kapp. 698, ratified March 8, 1859 ("Yakima Treaty") and the Treaty at Walla Walla Valley with other bands of Nez Perce, June 11, 1855, 12 Stat. 957, II Kapp. 702, ratified March 8, 1859 ("Nez Perce Treaty"). The Warm Springs, Yakima, Umatilla and Nez Perce Tribes oppose Colville's proposed intervention. The Yakima Nation and Nez Perce Tribe actively took part in opposing intervention at trial. Prior to trial, the Nez Perce and Colville tribes entered an agreed statement of facts, and thus, their dispute is limited to the legal implications of the agreed upon historical facts regarding the Chief Joseph Band of Nez Perce. The Yakima and Colville tribes agreed upon a number of facts regarding the Wenatchi, Entiat, Chelan, Columbia and Palus tribes, as set forth in the pretrial order, but actively disputed facts surrounding the movement of members of those tribes to the Colville Reservation as well as any legal significance to be attached to that movement. The states of Washington and Idaho indicated that they had no opposition to Colville intervention. The state of Oregon and the United States assent to intervention upon Colville establishing treaty rights. The Shoshone-Bannock took no active participation in the trial.

A three day court trial was held July 21-23, 1991. The following constitutes my findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

BACKGROUND

The Yakima Treaty of 1855 was entered into between Governor Stevens on behalf of the United States and "delegates" of the Yakima, Palus (or Palouse), Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and

bands of Indians which were "considered as one nation, under the name of 'Yakima,' with Kamaiakun as its Head Chief." Under the treaty, the tribes agreed to cede all interest in land they formerly occupied in Eastern Washington, reserving a single tract represented by the present day Yakima Reservation. In addition, the "confederated tribes and bands of Indians" reserved the exclusive right to take fish from waters within or bordering the reservation and "also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."

The Nez Perce Treaty of 1855, negotiated at Walla Walla, contains similar provisions for the ceding of title to all lands occupied in Washington and Oregon, reserving a tract of land represented, in part, by the present day Nez Perce Reservation, and reserving similar exclusive rights to fishing on and bordering the reservaiton, with rights to fish in usual and accustomed places off-reservation "in common" with non-Indian territory citizens. The treaty was signed by 54 Indians on behalf of the Nez Perce, including Chiefs Lawyer and Old Joseph.

The historical background surrounding the formation of the United States' treaties with the Indians in the Pacific Northwest is set forth in greater detail in Judge Boldt's decision in *United States v. Washington,* 384 F.Supp. 312, 330-334 (W.D.Wash.1974), *aff'd* 520 F.2d 676 (1975). In this opinion, Judge Boldt made extensive findings and conclusions which, together with the findings and conclusions previously entered in this case, laid the groundwork for the settlement and adoption of the Columbia River Management Plan in effect today. In his decision, Judge Boldt traced the history of the so-called "Stevens" treaties, made factual findings as to what constituted the "customary and usual" off-reservation fishing sites for the individual tribes and made legal conclusions as to the balance between tribal rights and state police power. The court issued an injunction against

the state of Washington from interfering with tribal fishing rights, except to the extent that such regulation is necessary to safeguard fish resources from depletion or destruction. In addition, Judge Boldt held that the treaty tribes were entitled to take up to 50% of the harvestable fish on runs passing through their traditional off-reservation fishing grounds. Judge Boldt's decision was "substantially upheld" by the Supreme Court in *Washington v. Washington Passenger Fishing Vessel Assn.*, 443 U.S. 658, 685, 99 S.Ct. 3055, 3074, 61 L.Ed.2d 823 (1979). *See United States v. Suquamish Indian Tribe*, 901 F.2d 772, 774 (9th Cir. 1990).

The present case, *United States v. Oregon*, Civ. No. 68-513-MA, is the outgrowth of a consolidation with *Sohappy v. Smith*, Civ. No. 68-409, in 1968.[2] As in *United States v. Washington*, these cases were brought against the State of Oregon to define the Indians' treaty right to take fish "at all usual and accustomed places" on the Columbia River and its tributaries and to determine the extent to which the State of Oregon could regulate fishing after *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968).[3] Four Indian Tribes, including the Yakima Indian Nation, the Confederated Tribes and bands of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Reservation and the Nez Perce Tribe of Idaho, intervened as plaintiffs in the action filed by the United States. *Sohappy*, 302 F.Supp. 899 (D.Or.1969).

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[2] The historical background of *United States v. Oregon*, Civ. No. 68-513, is also set forth in my Amended Opinion of Oct. 7, 1988, adopting the 1988 Columbia River Fish Management Plan. 122 F.R.D. 571.

[3] In *Puyallup*, the Supreme Court declared that the Indians' right to fish at their usual and accustomed places could not be qualified by the State, but that the State could regulate the manner and size of the Indians' commercial take in the interests of conservation. 391 U.S. at 398, 88 S.Ct. at 1728.

On July 8, 1969, the Hon. Robert C. Belloni construed the Indians' treaty fishing right and considered the manner and extent to which the State of Oregon could regulate fishing. *Sohappy*, 302 F.Supp. at 911-12. Unlike the Boldt decision however, Judge Belloni limited the scope of his findings and conclusions to setting the parameters within which the state could regulate tribal fishing. The court concluded that the state's power to regulate Indian fishing rights was limited to those regulaitons necessary for conservation and that such regulations had to be non-discriminatory and meet appropriate standards. *Id.*, at 907-910. Judge Belloni retained jurisdiction to grant further or amended relief: "[t]his court cannot prescribe in advance all details of appropriate and permissible regulation of the Indian fishery . . . the requirements of fishery regulation are such that many of the specific restrictions, particularly as to timing and length of seasons cannot be made until the fish are actually passing through the fishing areas." *Id.*, at 911. Thus, this court has exercised, and continues to exercise, jurisdiction whenever any party applies to the court for equitable relief from the decree.

Between 1969 and 1976 the parties appeared before the court several times. Judge Belloni urged the parties to adopt a comprehensive plan for allocation and management of Columbia River anadromous fish. In 1974, the State of Washington was allowed to intervene. In 1983, the Ninth Circuit allowed the State of Idaho to intervene.

In 1977, the parties presented a five year plan to the court entitled "A Plan for Managing the Fisheries on Stocks Originating from the Columbia River and its Tributaries above Bonneville Dam." This original plan set conservation goals for each fish species, established fishing regulations and provided for the establishment of future management techniques. However, the plan did not establish fishing locations, times or quotas.

United States v. Oregon, 718 F.2d 299, 302 (9th Cir. 1983). Instead, these details are regulated through the Columbia River Compact, an interstate agency created by Oregon and Washington and ratified by Congress. *Id.*

With the expiration of the original plan in 1982, the court ordered the parties to attempt to agree upon a revised or modified agreement. *United States v. Oregon,* Civ. No. 68-513 (Aug. 24, 1983; and Sept. 6, 1983). Pursuant to these orders, the parties continued negotiations on a comprehensive plan, during which time they operated under several one-year management plans. In 1988 a plan was submitted to the court with the approval of all but two parties, Idaho and the Shoshone-Bannock. I adopted this plan, with a few restrictions, on October 7, 1988.

Currently, when any party in this case objects to a decision of the Compact, it may submit any matter that is within the continuing jurisdiction of this court to the court for determination under Paragraph CI and Part IV of the Agreement. *See e.g. United States v. Oregon,* 718 F.2d 299 (9th Cir.1983) (district court may alter fishing season to restore tribal fishing area and may review Compact's calculation of deficit re Indian share of harvest) and my orders of Sept. 27, 1991 and Ocotber 24, 1991 on the Yakima and Umatilla Tribes' motions for temporary restraining orders.

Thus, Colville seeks intervention in a proceeding that has been under the continuing jurisdiction and supervision of this court since 1968. On August 7, 1989, I granted Colville's motion to intervene, on the condition that it first establish that it has federally secured off-reservation treaty fishing rights either by initial grant or by succession in interest.

On February 20, 1990, I granted in part and denied in part the Colville's motion for partial summary judgment on the issue of collateral estoppel of factual issues litigated before the Indian Claims Commission (ICC), re-

ported at 7 Ind. Cl. Comm. 794 (1959), 12 Ind. Cl. Comm. 301 (1963) and 15 Ind. Cl. Comm. 196 (1965), and before the Court of Claims in *The Confederated Tribes of the Colville Reservation v. The Yakima Tribes of the Yakima Reservation,* 204 Ct.Cl. 868 (1974) (collectively referred to as the "claims decisions"). In those cases, the ICC was asked to resolve a dispute between the Yakima and Colville Tribes regarding their respective claims for unpaid compensation for lands ceded under the Yakima treaty of 1855. In allocating the damage award, the ICC found that the Chelan, Wenatchi, Entiat, Columbia and Palus tribes were parties to the Treaty of 1855, 7 Ind. Cl. Comm. at 800-01, and that the Colville represented their interests for the purpose of allocating a monetary damage award. In so doing, the ICC made the following factual determinations: (1) the Yakima Tribe was "not synonymous with nor the successor to the Yakima Nation which was created in 1855 and was . . . wronged by the treaty of 1855," (2) the "Yakima Nation which was created in 1855 does not exist as an entity today,"[4] (3) "a significant number of Indians who were members of various of the fourteen tribes or groups comprising the Yakima Nation became located on the Colville Reservation. Indians from the Chelan, Entiat, Wenatchi, Columbia and Palus tribes in particular became loacted in large numbers on the Colville Reservation," 12 Ind. Cl. Comm. at 368, and (4) "[t]here was no movement as a tribe by either the Chelan, Entiat, Wenatchi or Columbia onto the Yakima reservation although individual members of each of the four tribes did move to that reservation." 7 Ind. Cl. Comm. at 802. While the ICC found that "Chief Moses and his followers did, in fact, move onto the Colville Reservation and the members of his band or the descendants thereof have continued to reside on that reservation until the present date,"

[4] Although I felt bound by this finding, I note that it is somewhat misleading since the "Yakima Nation" referenced in the Treaty of 1855 has never existed.

7 Ind. Cl. Comm. at 811, *accord* 12 Ind. Cl. Comm. at 368, it did not find that the Chelan, Wenatchi, Entiat, Columbia, and Palus tribes moved to the Colville Reservation "as tribes."

In my opinion of February 20, 1990, I found that many of the issues raised by the Colville's motion for summary judgment were "in substance the same" as those factual issues resolved in the claims decisions and that collateral estoppel applied. However, I held that the claims decisions left unresolved the issue of whether the abroginial tribes moved "as tribes" onto the Colville Reservation and that matters as to the assimilation, consolidation and/or merger of the aboriginal tribes with other tribes located on the Colville Reservation had not been resolved as to prospective fishing rights. I further found that the ICC's conclusion that Colville represented these tribes for the purpose of allocating the damage award did not answer the question presented in this case as to whether Colville may exercise treaty fishing rights.

FINDINGS OF FACT

a. *Nez Perce*

The Nez Perce and Colville Tribes have submitted agreed facts along with "secondary materials" in support of those facts. I have reviewed these records and find them to be an accurate depiction of the historical record. Accordingly, I adopt the parties' agreed facts as my factual findings as to the Chief Joseph Band of Nez Perce.[5] For the purposes of this opinion, I take particular note of the following facts:

The "Chief Joseph Band" [6] of Nez Perce is a title employed to describe a "sub-group" of the Nez Perce which

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[5] These agreed facts are attached as Appendix 1 to this opinion.

[6] The term "band" within the area of the Northwest Interior Plateau is defined by ethnographers as a "principal village together with its satellite villages." Gary Palmer, *Direct Testimony*, at Part 1-3.

occupied the Wallowa-Imnaha area in aboriginal times up to the Nez Perce War of 1877. Verne Ray, *Ethnohistory of the Joseph Band of Nez Perce Indians: 1805-1905*, pp. 4, 9 and 87. The Chief Joseph Band considered maintenance of their traditional territory in the Wallowa-Imnaha drainages of the utmost importance. *Id.*, at 10 and 91, (*citing* declarations of Chief Joseph: "[W]e will defend this land as long as a drop of Indian blood warms the hearts of our men.")[7] Thus, when the Nez Perce Treaty of 1863 was negotiated by Lawyer, extinguishing title to approximately 90% more land and restricting the Nez Perce reservation to 750,000 acres, several Nez Perce leaders refused to sign, including Old Joseph, head of the Wal?wama Band which lived outside of the proposed reservation land.[8] The 1863 treaty caused a sharp division between the Nez Perce led by Lawyer, who resided in the North and who was recognized by the U.S. as the head chief of the Nez Perce, and the Chief Joseph Band of Nez Perce, known at the time as the Wal?wama Band. Ray, *Ethnohistory of the Chief Joseph Band*, pp. 21-24, 32-33.[9]

The Chief Joseph band of Wal?wamas continued to live on their traditional lands in defiance of the 1863 treaty until October of 1877 during the Nez Perce war. Joseph surrendered to General Miles in Montana and he and the Wal?wama Band were sent to Kansas. Of the approximately 430 Nez Perce sent to Fort Leavenworth, at least one-quarter perished within a few months due to poor living conditions, severe weather and a lack of

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[7] This is also true of Chief Moses and the Palus, discussed *infra*.

[8] Old Joseph did not attend the negotiations in 1863 given his failing health. However, Young Joseph, his son and successor, attended on behalf of the band. Ray, *Ethnohistory of the Chief Joseph Band of the Nez Perce: 1805-1905*, p. 20.

[9] In *W.W. Woolverton v. U.S.*, 29 Ct.Cl. 107 (1894) the court found that the Chief Joseph Band of Nez Perce ceased to be a part of the Nez Perce Tribe and was not entitled to monetary benefits under treaty provisions with the Nez Perce tribe.

medical care. Ray, *Id.*, at 64-66. In 1879 the Joseph Band was again moved 180 miles into Oklahoma and several more perished on this trip and in the course of the subsequent winter months due to the dire conditions they were forced to endure. *Id.*, at 69. Between 1885 and 1923, Congress passed a series of appropriations for the "Chief Joseph Band," which allowed them to return to the Northwest. Beginning on May 17, 1885, approximately 150 persons were sent to the Colville Reservation and 118 were sent to Lapwai in Idaho. *Id.*, at 75. The band was divided out of concerns related to the pending indictments against Chief Joseph and his followers in Idaho. *Id.*, at 76. Joseph and his followers were initially sent to Fort Spokane and within a few months moved to the Nespelem valley on the Colville Reservation. *Id.*, at 79-80. One family of Chief Joseph's band remained at Fort Spokane and eventually moved to the Nez Perce Reservation in Idaho. *Id.*, at 81. Throughout this period, Joseph actively disputed all proposals and efforts to move his band to any territory other than the band's original tribal territory in the Wallowa-Imnaha drainage. *Id.*

b. *Wenatchi, Entiat, Chelan, Columbia & Palus*

The Yakima and Colville Tribes have agreed that a number of facts are not in dispute based, in part, upon my ruling on Colville's motion for summary judgment. Thus, to the extent that I have not already adopted these facts as my findings in this case, I find agreed facts #1-43 to be an accurate depiction of the historical record. Accordingly, I adopt these facts #1-43 as a portion of my factual findings as to the Wenatchi, Entiat, Chelan, Columbia and Palus Indians.[10]

As noted above, Article III of the Yakima Treaty expressly reserved to the Yakima Nation and its members the exclusive right of taking fish in all the streams that ran

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[10] These agreed facts are attached as Appendix 2 to this opinion.

through or bordered the reservation and also the right of taking fish at all usual and accustomed places in common with the citizens of the territory. Following the ratification of this treaty by Congress in 1859, many of treaty signatories moved onto the Yakima Reservation as anticipated. However, not all proceeded as "planned" by the U.S. Although they were parties to the Yakima treaty, a "significant number" of the Chelan, Wenatchi, Entiat, Columbia and Palus refused to move into the Yakima Reservation.[11]

Chief Moses, who was the chief of the Columbia and was recognized by the United States as the spokesperson for the Wenatchi, Entiat, Columbia and Chelan, was among those people who refused to move onto the Yakima reservation. The so-called "Columbia Confederacy" led by Moses consisted of tribal members who were predominantly Salish speaking and who were closely related by geographic proximity and inter-marriages. *See* Verne Ray, *The Columbia Indian Confederacy: A League of Central Plateau Tribes*, at p. 771 (1960).[12] Prior to the United States' negotiations with Moses, the historical records are silent as to any contact between the government and members of the Wenatchi, Entiat, Columbia or Chelan. *Id.*, at 773.

Moses was not present at, and there is no evidence to suggest that he took part in the Walla Walla treaty

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[11] I note at the outset that there exists a degree of uncertainty in the specific identification of Indians by tribal designation, given that certain tribes inter-married extensively. For example, as Gary Palmer points out, Verne Ray experienced some difficulty in his attempt to identify villages as that of the Wenatchi, Chelan, Entiat and Methow in his 1936 Report. Palmer, *Direct Testimony*, at p. 3-2, and 4-1.

[12] According to Ray, the Columbia Confederacy was first headed by Moses' father, Shooktalkoosum, who was part Okanagan and part Chelan, but whose chieftainship began with the Columbia Indians. Ray, *Columbia Confederacy* at p. 774 & 785.

negotiations in 1855.[13] In addition, Tookolookin, a Wenatchi Chief who was present and signed the treaty, appears to have done so on his own given the lack of documentary or historical sources to indicate the presence or participation of a Wenatchi delegation. Ray, *Tribes* (1971), at p. 47. There is no mention in the records of the presence of Columbia, Chelan or Entiat. *Id.*, at 47-48.

Instead, Moses negotiated directly with federal authorities in an attempt to gain a separate reservation for his people. After the government failed at several attempts to get members of Moses' group to go onto the Yakima Reservation,[14] in 1879 the U.S. agreed to create a reservation for Moses, known as the "Moses Columbia Reservation," out of land encompassing a portion of the aboriginal lands of the Wenatchi, Entiat, Columbia and Chelan directly to the west of the Colville Reservation. Permission was later given for Methow and Okanagan Indians to live within this reservation also. Ray, *Columbia Confederacy*, at p. 788. The agreement itself is silent as to fishing rights and there is nothing in the record of the negotiation process to indicate that fishing rights were discussed.

However, neither Moses, nor his followers, nor the federal government was satisfied with the 1879 agreement and no one party fully honored its terms. The Entiat people were moved onto the reservation by force of the Army, many of the Chelans were already present, and the

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[13] However, as Ray explains, no minutes were taken and no official record was kept of the negotiations which took place with Kamaiakun and others on June 8 and 9, 1855. Verne Ray, *Tribes of the Columbia Confederacy and the Palus*, p. 40 (1971). However, there are official reports of separate negotiations with the Yakimas, in which Kamaiakun took part. *Id.*, at 42-43.

[14] Ray notes that governmental efforts were only partially successful with the Wenatchi who were offered homesteads in their own territory and who shared close ties with the Kittitas. *Columbia Confederacy*, at p. 786.

Wenatchi and Columbia Indians simply remained where they were off the proposed reservation. Ray, *Id.*, at 788-89. Moses refused to move onto the reservation and the U.S. never gave its final approval.

Just prior to this time, the Colville Reservation was set aside by Executive Order on July 2, 1872 for "Indians as the Department of the Interior may see fit to locate thereon." Tribes specifically contemplated by this order included the Methow, Okanagan, San Poel, Colville, Calispel, Spokan, and Coeur d'Alene.[15] Palmer, *Direct Testimony*, at p. 6-3.

In 1883 Moses and the U.S. returned to the bargaining table. Moses, along with Chiefs Sarsarpkin, Lot and Tonasket, negotiated with the United States to restore the Moses Reservation of 1879 to the public domain and to allow Moses and his people to take allotments on the Moses Columbia Reservation or remove to the Colville Reservation. Members of the Wenatchi Tribe were moved to the Colville Reservation with funds provided by Congressional Acts in 1902 and 1904. Members of the Columbia and Entiat tribes moved to allotments on the Colville reservation, attempting to stay on allotments which fell within their traditional areas. However, the members of the Chelan tribe who already resided in areas within the Moses Columbia Reservation prior to 1883, and who refused to take allotments on the Columbia Reservation under the 1883 Moses Agreement, were moved to the Colville Reservation by U.S. military forces in 1890.

The movement of members of the Palus Tribe to the Colville Reservation was more scattered and extended over a longer period. As explained by David Chance, the Palus formed a distinct ethnic group consisting of six to twenty-seven villages located along the Snake River. Each

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[15] Separate reservations were later set up for the Calispel, Spokan and Coeur d'Alene.

village band was headed by a chief and several also had a "second chief," who might head a part of the band in pursuit of food away from the village. Chance concludes, based upon their philosophic ties to the Dreamer Religion, that the Palus would have been particularly disinclined to accept white Anglo-Saxon numerical groupings and relocation to a reservation with distinct boundaries. At least two Palus chiefs attended the Yakima Treaty negotiations and Chief Kahlahtoose signed the treaty and was recognized by the United States as the "leader" of the Palus. It is believed that Kahlahtoose was killed sometime during the fighting between the Indians and the U.S. in 1858.

Members of the Palus also attended the Nez Perce Treaty Council in 1863 out of concern that the Nez Perce might cede portions of Palus traditional homeland. Different members of the Palus spoke with U.S. officials in the 1870's and 1880's and communicated their desire to remain on their traditional tribal territory and obtain allotments along the Snake River.

In the 1880's, following the Nez Perce War of 1877, government agents reported to General Howard that a few "disaffected" Palus, Nez Perce and other tribes were beginning to visit the Colville Valley. Chance estimates that approximately 100 Palus moved to the Colville reservation between 1885 and 1900 and settled in the area of Nespelem, but continued to return to visit their native lands in the summers. The "leading chief" of the Palus on the Colville Reservation in the early part of the 20th Century was Cleveland Kamiakin, one of four sons of Chief Kamaiakun, who traced his ancestry to the Palus, Yakima and Spokan, and who signed the Yakima Treaty, ostensibly on behalf of the Yakima and Palus.

c. *The Confederated Tribes of the Colville Reservation*

The present day Colville Confederacy governs under a Constitution and By-laws ratified on February 26, 1938 and approved by the Commissioner of Indian Affairs on

April 19, 1938. The proposed adoption of a Constitutional form of government under the Indian Reorganization Act was controversial and was debated at length by leaders within the Colville Confederacy. Leading members of the Wenatchi, Palus and the Chief Joseph Band of Nez Perce actively opposed the constitutional reorganization. Dr. Jay Miller submitted written testimony regarding the effects of governmental policy on tribal structure. He concludes that the tribes were "forced" to accept the new structure by the federal government. The Confederated Tribes of the Colville Reservation is recognized today as being comprised of members of the Methow, Okanagan, San Poel, Colville, Calispel, Spokan, Coeur d'Alene, Wenatchi, Entiat, Chelan, Columbia, Palus, Kittitas, Wanapam, Yakima, Klickitat, Wishram, Nez Perce and Skeen. As of 1954, members of the Wenatchi, Entiat, Chelan, Columbia, Palus, and Chief Joseph Band of Nez Perce comprise approximately 866 of the approximate total population of 2,887 enrolled Colville members.

At trial, Colville presented testimony from many of its tribal elders regarding Wenatchi, Entiat, Chelan, Columbia and Palus and Nez Perce tribal traditions and practices which have been preserved and continued at the Reservation. Members of the Wenatchi, Chelan, Columbia and Entiat maintained tribal cemeteries both on and off the reservation. Mathew Dick testified about the Wenatchis' continuous exercise of their rights to gather food off-reservation in traditional Wenatchi territory. Celia Dick testified about Wenatchi efforts to continue fishing in the Icicle River. Julianne Dick, the granddaughter of Chelan Bob, testified about fishing and root gathering in traditional Chelan territory throughout her life. Chance testified that Palus leaders continue to function as they traditionally have and the Palus members continue to remain distinct and independent.

The Chief Joseph Band of Nez Perce maintain a ceremonial Long House on the reservation. According to

Verne Ray, who visited Joseph's people at Colville in 1928, the band lived in "distant isolation" and continued to perform traditional mid-summer ceremonies. Ray, *Ethnohistory of the Chief Joseph Band*, p. 98. Ida Desautel, an Elder, testified at trial that the band continues to maintain separateness by preservation of the Nez Perce language, customs and religion.

Margie Hutchinson testified about how tribal records are maintained by the Colville Agency, and the process whereby Colville members are given a specific tribal designation. She explained that most Colville members are affiliated with the tribes to which their parents claim lineage. For example, an Indian whose mother is a Yakima and whose father is an Okanagan could identify herself as either a Yakima, an Okanagan or both. If she were also enrolled as a Colville member, she would claim to be both a Colville and an Okanagan, a Colville of Yakima lineage, or all three. However, a "Colville" designation only requires enrollment in the Colville Confederacy, while an "Okanagan" designation would require a minimum 25% blood-line. In contrast, membership in the Yakima or Nez Perce Tribes require both a minimum 25% blood line and enrollment. Mary Marchand, testified that residence on the Colville Reservation is not required for membership.

All of the members of the Colville Confederacy who testified at trial demonstrated a desire to adhere to ancestral customs. In addition, they expressed a sincere pride in their Colville membership and in the activities taking place within the Colville Reservation.

CONCLUSIONS OF LAW

Introduction

Counsel for all parties must be commended for their skill in preparing and arguing this case. I have spent a great deal of time contemplating the legal and equitable concerns raised by counsel and have found that, without

maintaining a focus on the central issue presented with this complaint in intervention, one is easily lead astray. Due in part ot counsels' skill and familiarity with this field and also due to the unique challenges posed by legal analysis of historical and tribal events, I am compelled to carefully delineate and define what I find is the central or "core" issue raised by the Colville complaint in intervention, and further, to emphasize what is *not* raised thereby.

First, the issue before me is not whether individual members of the Colville Confederacy "lost" treaty rights by enrolling as Colvilles. Nor is the issue whether the Colville Confederacy should exercise rights on behalf of these bands in the place of the Yakimas and the Nez Perce—the parties expressly agreed that the only factual determination before me is the constituency of the Colville Reservation, and therefore, I make no findings or comparisons as to the *number* of treaty Indians on the Colville Reservation as opposed to the Yakima or Nez Perce Reservations. Finally, the issue is not whether *individuals* who reside on the Colville Reservation and who are able to trace their ancestry to treaty signatory tribes may fish, as that is a matter within exclusive tribal jurisdiction and is subject to the rules and regulations of the tribes who exercise such regulatory power.

I find that the issue before me is whether The Confederated Tribes of Colville Reservation may exercise authority, as a separate Treaty Tribe, to administer or regulate off-reservation treaty fishing rights based upon the fact that some of its members can trace their ancestry to parties to the Yakima or the Nez Perce Treaties of 1855.

Discussion

In order to decide what I have identified as the issue in this case, I must first consider who can hold treaty rights, or wherein the authority to control the exercise of those rights is vested.

Rights, enumerated under treaties, are reserved to communities or "tribes" rather than to individuals. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 671-73, 99 S.Ct. 3055, 3067-68, 61 L.Ed.2d 823 (1979); *United States v. Washington*, 476 F.Supp. 1101, 1110 (W.D.Wash. 1979) *aff'd*, 641 F.2d 1368 (9th Cir.1981), *cert. denied*, 454 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982). Because individuals have no enforceable off-reservation fishing rights, when and how an individual may use treaty rights is an "internal affair" of the tribe. *Settler v. Lameer*, 507 F.2d 231, 237 (9th Cir.1974).

Accordingly, the Ninth Circuit has held that any "tribe" which seeks to assert fishing rights as a treaty signatory must first establish treaty tribe status. *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th Cir.1990). Treaty tribe status may be established by "a group of citizens of Indian ancestry [which has] descended from a treaty signatory and has maintained an organized tribal structure." *Id., citing United States v. Washington*, 502 F.2d 676, 693 (9th Cir.1975); *see also United States v. Washington*, 459 F.Supp. 1020, 1037 (W.D.Wash.1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981) (intervention requires *prima facie* evidence of treaty status and tribal organization, noting however, that neither Congress nor the Executive has defined "tribe" in terms of federal relationships with Indians).[16]

In early historic time in the Interior Plateau, there were at least three levels of political organization: vil-

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[16] However, I note that even this simplistic definition of a "tribe" is subject to a degree of modern interpretation and extrapolation that is ill-suited in its application to Indian political structure. *See* Ray, *Native Villages and Groupings*, at pp. 111-113 and Wilkinson, *American Indians, Time and the Law*, at 77 (Yale University Press 1987) ("Tribalism is ultimately a matter of self-definition . . . tribalism continues until the members themselves extinguish it"). However, it is the only term of art available under the law and further is the definition which I am bound to apply under the law of this Circuit.

lage, band and tribe. Palmer, *Direct Testimony*, p. 1-3. Although aboriginal bands and villages fished and gathered food in "usual and custom" areas, state lines, fences and political boundaries were unknown. Further, the centralized leadership structure that we recognize today was not a part of the tribal structure. *See* Verne Ray, *Native Villages and Groupings of the Columbia Basin*, Pacific Northwest Quarterly Vol. 27, p. 111 (noting wide variations in political units, understanding of which is "hampered by present day confusions with linguistic units, arbitrary Indian Service administration units, and reaffiliations growing out of widespread decimation"). Within a single band, there may have been five or six different leaders, each of equal standing, who "governed" in a particular area of expertise, such as hunting or medicine. Based upon these unique historical groupings, no single identifying label is determinative—i.e. a group identified as a "band" which functioned as a cohesive political unit may fall within the meaning of the word "tribe," as used by the courts, if it maintained continuous cultural and political cohesion.

Further, in determining treaty tribe status, I am aware that government recognition is not determinative of treaty rights. *United States v. Washington*, 641 F.2d at 1371. Rather, the "proper" inquiry must focus upon the maintenance of an organized tribal structure where "defining characteristics of the original tribe persist in an evolving tribal community." *Id.* While a degree of "assimilation" into other cultures is inevitable, it will not result in an abandonment of tribal structure unless the assimilation is "complete." *Id.*, at 1373. *See also Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 744 (joint occupancy of reservation does not, standing alone, constitute merger or consolidation of two tribes). Thus, I must make certain allowances for evolution and some dispersion attributable to inter-marriage and educational or technological advances.

The Colville Confederacy bears the burden of establishing treaty tribe status. *United States v. Washington*, 730 F.2d 1314, 1316-17 (9th Cir.1984). The "sole purpose" of requiring proof of tribal status is to ensure that the group asserting treaty rights is the group named in the treaty. *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir.1981).

One of the unfortunate aspects about sitting as a trial court on a case of this kind in 1991, is the immediate awkwardness presented in attempting to apply modern legal Anglo-Saxon principles and precedent to events involving tribal associations which took place over 130 years ago. What we recognize today as a political "leader" or an organized form of government simply does not apply to native American culture of the 19th Century. As the parties agree, Indian culture at the time of the Stevens treaties was vastly more complex than the treaties recognized. Further, the Indians' cultural and political responses to the encroachment of white settlers was diverse and often, divisive. Inter-tribal and inter-cultural divisions commonly arose amongst formerly cohesive groups over religion and to what extent, if any, Western culture should be adopted into tribal traditions. *See generally*, Merrill D. Beal, "*I Will Fight No More Forever: Chief Joseph and the Nez Perce War*, 16-47 (Ballentine Books, 1963).

This awkwardness is further exacerbated by the nature of the treaties themselves which were designed and created by Governor Stevens in haste, at a time when he was under pressure from the federal government to extinguish Indian title to all lands and relocate Indians to reservations. *See United States v. Washington*, 520 F.2d 676, 688 (9th Cir.1975) ("tribes" in western Washington were constructed arbitrarily by Stevens for convenience in negotiating the treaties). Through Governor Stevens and the treaty commission, small tribes or bands were grouped or consolidated into larger tribal units that became the entities with which the United States negotiated the

treaties. *United States v. Washington*, 384 F.Supp. 312, 354-55 (W.D.Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97, *reh'g denied* 424 U.S. 978, 96 S.Ct. 1487, 47 L.Ed.2d 750 (1976). Thus, to the extent that Stevens made any effort to recognize and preserve traditional Indian territory in drawing the boundaries for the reservation or to group traditional tribal entities for the purposes of political negotiation, his efforts, as reflected in the treaties produced, were woefully inaccurate.

Finally, I recognize that reference to and reliance upon legal precedent must be approached with caution given the unique nature of Indian culture and the unique facts and circumstances that each case presents. Thus, in my review of other cases in which similar claims of intervention based upon treaty tribe status have been raised, I have found certain limited parallels and contrasts which I can draw, but no binding conclusions. Therefore, my discussion of these cases is intended merely to illustrate the spectrum of historical and legal precedents in this area.

I find the case of *United States v. Washington*, 476 F.Supp. 1101 (W.D.Wash.1979) one of the more helpful decisions to demonstrate the kinds of factors I may look to in determining whether the Colville Confederacy should be recognized as a "successor Indian government," and thereby vested with the authority to administer treaty rights.[17] Although the facts differ, the legal theories urged, such as successor in interest status, are similar to the arguments urged by Colville. In that case, five "groups" claiming to be tribes which were parties to the Medicine Creek and Point Elliot treaties sought fishing rights through intervention in the case. The Duwamish, Samish, Snohomish, Snoqualamie and Steilacoom groups

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[17] Although Judge Boldt relied, in part, upon government recognition as a factor, I recognize that government recognition is *not* determinative of treaty rights. *United States v. Washington*, 641 F.2d at 1371.

had members who were descendants of treaty tribes and, as such, had obtained judgments in the Indian Claims Commission as "groups." As to the present day Duwamish tribal organization, the court found that it lacked attributes of sovereignty, had not been recognized as a governmental or political entity by the U.S., did not have an approved membership roll and that members had not lived as a continuous, separate and cohesive Indian cultural or political community. *Id.*, at 1105. Thus, although many, or perhaps even all, of the individual members of the Duwamish "group" were descendants of a treaty tribe, the court found that the proposed Duwamish intervenor was not an "entity" that descended from any of the tribal entities that were signatory to the treaty. *Id.*

As to the Samish Indians, the court found that its members were descendants of the 1855 Samish Indians who were represented at the Treaty of Point Elliott by Chow-its-hoot, the Lummi signer. *Id.*, at 1106. Following the treaty, most of the Samish moved to the Lummi reservation. Later, others moved to the Swinomish Reservation. Unlike the Confederated Tribes of the Colville Reservation, the proposed intervenor Samish Tribe exercised no sovereignty over its members or any territory, was not recognized by the U.S., and had no approved organizational structure or membership rolls. However, the Samish did have a constitution, by-laws, a tribal council and claimed 549 members. The court found that the proposed Samish intervenor was not an entity descended from any of the tribal enties that were signatories to treaty since its members had not maintained an organized tribal structure and had "no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation." *Id.*

As to the Snohomish, the court found that the proposed intervenor was composed "primarily" of persons who descended from Indians who lived in the vicinity of the Snohomish River in 1855 and who were a party to the 1855 Treaty of Point Elliott. The court found that, like

the Samish, the Snohomish exercised "no attributes of sovereignty over its members or any territory," maintained no approved membership rolls and was not recognized by the U.S. as a political entity. However, it did have a constitution, by-laws, a tribal counsel and claimed 720 members. The court concluded that the members of the Snohomish "tribe" did not maintain a continuous, separate and cohesive cultural or political community, and thus, was not an entity descended from a treaty signatory. *Id.*

As to the Snoqualamie, the court found that the proposed intervenor was composed primarily of persons who descended from the Snoqualamoo Indians named in the Treaty in 1855. The Snohomish Bay Reservation desribed in the treaty was intended for the Snoqualamie Indians. However, most remained off the reservation, some settling on the Tulalip Reservation and some enrolling in other tribal communities. *Id.*, at 1108. As with the other proposed intervenors, the court concluded that the Snoqualamie "Tribe" had failed to maintain a continuous distinct and cohesive political or cultural structure and thus, was not an entity descended from a treaty signatory. *Id.*, at 1108.

The court made similar findings and conclusions as to the Steilacoom, noting however, that "significant numbers of the Intervenor Steilacoom Tribe are not descended from the Steilacoom or other Indians who were parties to the Treaty of Medicine Creek." *Id.*, at 1110.

I also find the case of *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir.1981) instructive. In that case, the Wahkiakum Band claimed off-reservation fishing rights on the ground that it was a beneficiary of a treaty between the United States and the Quinaults and Quillahutes which was signed on July 1, 1855 and January 24, 1856. Although Chinook were present at the treaty negotiations, they did not sign the

treaties. *Id.*, at 178 n. 4.[18] However, the Wahkiakum Band did not seek to trace its fishing rights directly to the treaties, but rather to link itself to the treaties by reference to an Executive Order issued in 1873 which expanded the Quinault Reservation for the Quinault, Quillehute, Hoh, Quit "and other tribes of fish-eating Indians on the Pacific Coast." *Id.*, at 179. In rejecting this argument, the court held that the Wahkiakums "ignored the structure of the treaty" which could not be expanded beyond the original signatories based upon "subsequent affiliation." *Id.* The court noted that the Wahkiakum could share tribal rights as Quinault "affiliates" by satisfying Article III of the treaty and taking an allotment on the Quinault Reservation. However, the court found that the Wahkiakum did not independently retain tribal off-reservation fishing rights given Congressional extinguishment of "all rights" and a settlement of "all claims" with the government with the Act of August 24, 1912, 37 Stat. 518, 535. *Id.*, at 180.

Finally, in *Suquamish*, 901 F.2d 772, 773-4 (9th Cir. 1990), the Suquamish attempted to establish treaty tribe status by claiming it was a successor in interest to the treaty-time Duwamish Tribe.[19] The Duwamish and Suquamish were among 20 tribes which were parties to the 1855 Treaty of Point Elliott. Seattle was identified as chief of the Duwamish and Suquamish tribes in the treaty, but represented both groups in name only. Generally, the treaty-time Duwamish occupied the area around present-day Seattle and Renton, Washington. Originally, the Duwamish were to be settled on the Port Madison Reservation, within Suquamish territory. The Duwamish

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[18] In addition, the court noted that the Wahkiakum Band was neither a signatory to nor a political successor to any ratified treaty. *Id.*, at 180 n. 11.

[19] In the earlier proceeding before Judge Boldt, the court determined that the present day Duwamish tribal organization did not hold fishing rights reserved to the Duwamish Tribe which signed the treaty. *Id.*, at 775, n. 8 *citing Washington*, 476 F.Supp. at 1104-5.

strenuously objected to this removal and were so hostile to the Suquamish that the Superintendent of Indian Affairs approved a sub-agency for the Duwamish on Elliott Bay at the mouth of the Duwamish River. *United States v. Washington*, 476 F.Supp. at 1105. In the fall of 1856, most Duwamish returned to this sub-agency. During November and December of that year, more than half of the Duwamish returned to their traditional villages upriver and along Lake Washington while others eventually relocated to the Muckleshoot Reservation. However, around the turn of the century, forty-nine allotments were made at Fort Madison, nine of which were attributed to Duwamish Indians. The district court found that evidence of these nine allotments was insufficient to show a cohesive communal decision by the Duwamish to unite with the Suquamish and concluded that the Duwamish Tribe had not merged with the Suquamish Tribe such that the Suquamish Tribe could successfully claim it was a "political successor" to the treaty-time Duwamish Tribe. *Id.*, at 777.

Conclusions

As I noted previously, the argument urged by the Colville Confederacy in this case is unique. The Colville Confederacy did not exist when the 1855 treaties with the Yakima and Nez Perce were entered into. Thus, like the Wahkiakum Band, Colville does not claim fishing rights as a "signatory" to either treaty. However, in contrast to the Wahkiakum case, Colville does seek to establish a direct link to the 1855 treaties by tracing members of identifiable groups within the Colville Reservation—i.e. the Wenatchi, Entiat, Chelan, Columbia, Palus and Chief Joseph Band of Nez Perce—to treaty signatories. Further, in contrast to the successor-in-interest argument raised by the Suquamish, Colville does not contend that it was a separate entity which "merged" or consolidated with the Wenatchi, Entiat, Chelan, Columbia, Palus and Chief Joseph Band of Nez Perce thereby obtaining treaty

status as a combined political structure. Also in contrast to the *Suquamish* case, there is evidence in this case of an acceptance, albeit involuntary, of the combined political union of the Colville Confederacy. Finally, unlike the present day Duwamish tribal organization, the Samish, Snohomish, and Snoqualamie "tribes" who attempted to intervene into *U.S. v. Washington*, 476 F.Supp. 1101, the Colville Confederacy is not composed "primarily" of persons who are descendants of Indians who were named in and a party to the 1855 treaties.

Rather, Colville contends that, because the Wenatchi, Entiat, Chelan, Columbia, Palus, and Chief Joseph Band of Nez Perce have maintained "tribal" structures within the Colville Confederacy and because Colville is now their only recognized representative, the Colville Confederacy, as a whole, succeeds to the treaty interests reserved in 1855. Thus, in essence, Colville attempts to combine elements from each of the foregoing cases to establish treaty tribe status. However, such an amalgam of arguments—of maintaining distinct organized tribal structures while also "merging" into the Colville Confederacy—becomes inconsistent with itself.

Based upon my factual findings regarding the movement of Indians to the Colville Reservation and the present day composition of the Colville Confederacy, I conclude that, even if I were to find that the members of Wenatchi, Entiat, Columbia, Chelan, Palus and Chief Joseph Band of the Nez Perce moved to the reservation and maintained an organized "tribal" structure, they have not "merged" into the Colville Confederacy such that Colville could be declared to have "treaty tribe" status. The proposed intervenor in this case is the Confederated Tribes of the Colville Reservation which includes members of the Methow, Okanagan, San Poel, Colville, Calispel, Spokan, Coeur d'Alene Kittitas, Wanapam, Yakima, Klickitat, Wishram and Skeen tribes as well as Indians who trace their lineage to the Wenatchi, Entiat, Chelan, Columbia, Palus, Chief Joseph Band of Nez Perce. As

noted previously, members of the Wenatchi, Entiat, Chelan, Columbia, Palus and Chief Joseph Band of Nez Perce comprised approximately 866 of the approximate total population of 2,887 enrolled Colville members in 1954. Thus, to accept the argument urged by Colville would result in the majority benefiting from the treaty rights of a minority with a resulting proportionate loss of fishing rights to The Yakima Nation and Nez Perce tribes, both of whom have well established and highly organized off-reservation fishing regulatory authority.[20] As the law governing Indian treaties clearly underscores, treaty rights belong to tribal entities, not to individuals within the tribe. I find that the *tribal entities* which are reflected in the Yakima and Nez Perce treaties of 1855 are the present day Confederated Tribes and Bands of the Yakima Indian Nation and the Nez Perce Tribe of Idaho. While it is well established that individual members of a tribe or band retain personal rights regardless of their residence, their presence within a reservation or, as in this case, enrollment in another confederacy cannot result in a transfer of rights to the entire community. I conclude that the Nez Perce Tribe and Confederated Tribes and Bands of the Yakima Nation are the only duly recognized "tribal" organizations that may administer or regulate the exercise of fishing rights by treaty tribe members.[21]

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[20] In Judge Boldt's original decision, he describes the Yakima Nation as "a party to the treaty with the Yakimas." It is recognized by the U.S. as a currently functioning Indian tribe composed of the tribes and bands consolidated into the Yakima Nation by that treaty and maintaining a tribal government. *United States v. Washington*, 384 F.Supp. at 379-382. Further, the term "treaty tribe" as it appears in the decree includes that "Yakima Nation" at paragraph 10, but does not list individual member tribes or bands within that group. *Id.*, at 405-406.

[21] As Charles Wilkinson notes, although the treaties with the Indians are imperfect attempts to "group" previously independent groups or bands of Indians, the treaties did form obligations and are the only legal instruments available to guide courts in making determinations regarding modern day treaty rights.

Next, it is with the recognized limitations set forth in my "introduction" that I approach the factual issues regarding Moses' treaty negotiations with the federal government. Although I find that Sprague's conclusions regarding Moses' plans and intentions are to some degree speculative and lack substantial evidentiary support, I also find insufficient evidence to convince me that Moses, as the only recognized leader of the Wenatchi, Entiat, Columbia and Chelan at the time the treaties were negotiated, either bargained for or sought to reserve off-reservation fishing rights. In the treaties negotiated by Moses in 1879 and 1883, he clearly sought to establish rights to land in the traditional aboriginal territories of the Chelan, Entiat and Wenatchi, but no mention was made of fishing rights, nor was the Yakima treaty of 1855 referenced or incorporated. I find that the Wenatchi, Entiat, Chelan and Columbia Indians who moved to the Colville Reservation followed Moses and refused to be bound by the 1855 treaty. Moses and his followers deliberately sought to separate themselves from the "Yakima Nation" identified in the treaty. Thus, although many current members of the Colville Confederacy are descendants of groups identified as belonging to part of the Yakima Nation within the 1855 treaty, Colville has failed to establish that those descendants are entitled to exercise rights reserved to the Wenatchi, Entiat, Chelan and Columbia who signed the treaty as part of the "Yakima Nation."

The Palus appear to have shared a similar primary concern of maintaining their tribal territory. Although at least one member of the Palus signed the Yakima treaty, subsequent meetings between Palus leaders and the government focussed upon land rights. Further, more than other tribes, prior to their movement to the Colville Reservation, members of the Palus appear to have been loosely connected, grouped mainly on the basis of their geographic location around the Snake River rather than upon a cohesive political structure. Based upon the evidence, I conclude that although a number of Palus moved

to the Colville Reservation and maintained certain tribal traditions while there, the evidence is insufficient to show that the Palus moved "as a tribe."

According to Verne Ray, the Chief Joseph Band of Nez Perce appears to have maintained an independent "band" identity and territorial separation that were unique and distinct from all other bands of the Nez Perce. Although represented by Old Joseph at the Walla Walla negotiations in 1855, the Chief Joseph Band withdrew from any further political cohesion with the remaining Nez Perce bands at least as early as 1863, with their refusal to acknowledge the treaty signed by 51 other Nez Perce. Like Moses, Chief Joseph opted to disassociate his band from the others in order to maintain their traditional tribal territory and, eventually, to negotiate his own treaty to enable his band to return to the Northwest. I find that the Chief Joseph Band that moved to the Colville Reservation was distinct from and no longer a part of the "Nez Perce Tribe" which exists as a distinct entity today and which I find is the recognized administrator of rights reserved in the 1855 Nez Perce treaty.

Finally, to the extent that individual members of the Colville Confederacy seek to pursue treaty fishing rights, they are free to do so through the Yakima Nation and Nez Perce Tribe, the administrators of the 1855 and 1867 treaty rights at issue. I recognize the practical problems that such a suggestion creates based upon current Yakima and Nez Perce enrollment ordinances which require members to be enrolled in the tribe to exercise rights and which provide that no member may also be an enrolled member of another tribe. However, regulation of individual fishing rights within the tribe is a matter within the exclusive jurisdiction of the Yakima and Nez Perce Tribes and any amendment to their enrollment ordinances should be sought through those tribes.

CONCLUSION

In 1855, two distinct groups were singled out from within the Indian Community as the recognized holders of fishing rights reserved under the Yakima and Nez Perce treaties. The leaders, Kamaiakun and Lawyer, were recognized as the primary spokesmen for the "Yakima Nation" and the Nez Perce Tribes respectively. Unlike land rights, allotments or monetary compensation for the loss of land or resource mismanagement, fishing rights are a unique natural commodity. Tribal fishing rights may not be apportioned individually; they may not be bartered, transferred and they do not accrue interest—their value is indeterminate, and, for many Indians, these rights are priceless symbols of cultural and religious traditions. In order for the various treaty tribes to function together and share the fish "in common with the citizens of the Territory," the government necessarily had to look to some defined person or group within the Indian Community. I find that those treaties, and the judicial decisions which have struggled with their interpretations, have sought to achieve a system which recognizes an organized tribal structure as the administrator of rights reserved under the treaties in the form and substance which most closely resembles the framework envisioned by the treaties. I find the the administrators of those rights, as reflected in the 1855 treaties, are The Confederated Tribes and Bands of the Yakima Indian Nation and The Nez Perce Tribe of Idaho.

Based on the foregoing, I find that the Colville Confederated Tribes has failed to establish that it is the successor Indian government and the present day holder of treaty rights reserved to the Wenatchi, Entiat, Chelan, Columbia, Palus, or Chief Joseph Band of Nez Perce in the treaties of 1855 with the Yakima Nation or with the Nez Perce. Accordingly, the Colville complaint in intervention is dismissed.

APPENDIX 1

Nez Perce Agreed Facts

I. TRADITIONAL NEZ PERCE POLITICAL ORGANIZATION

1. The traditional Nez Perce political organization was comprised of villages, bands, band groups and the tribe. Villages were the smallest unit of government. Villages were often comprised of family or extended family groupings. Multiple villages combined together to form bands. Villages and bands were often identified with a particular river drainage. For certain purposes, bands would join together to form a band group. Collectively, all were included within the designation as the Tribe.

2. Best estimates are that there were approximately 16 or 17 Nez Perce Bands, 100 to 130 villages and numerous camps within the Nez Perce Tribe in the time period around 1855. These camps, villages, bands and the total Nez Perce territory they occupied, are identified on *Exhibit A*.[1] Between 1806 and 1860 population estimates for the Nez Perce Tribe fell between 1,700 to 8,000.

3. The traditional Nez Perce political organization which existed long into pre-historic times was one of flexible structure, adaptable to a variety of purposes. Leadership was established based largely upon an individual's performance of relevant acts and acceptance of that person as a leader by individuals for that particular purpose.

4. Within each level of political structure there were multiple leaders each of whom exercised general authority

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[1] The map is submitted for purposes of the issues between the Colville Confederated Tribes and Nez Perce Tribe only. The parties do not necessarily agree with the location of each particular village site identified. (Exhibits are not included.)

over activities that required governmental action at the respective levels of organization. For example, there were leaders recognized for activities such as warfare, hunting, fishing, religion, conflict resolution, healing and other specific activities within each village, band, band group and on a tribal wide basis. A spokesperson would often confer with a council and carry out the decisions made at council.

5. Villages, band, band groups and the tribe each had defined functions within the tribal structure and each acted as necessitated by the particular situation. For example, food gathering was an activity that was generally done at the village level with an individual accepted as the leader for that activity. Hunting buffalo on the plains of what is now Montana and Wyoming was often done by band groups of the tribe because it required military strength for protection as well as enough people to engage in hunting and processing animals. Major acts of warfare were typically a tribal activity.

6. Villages and bands each occupied identifiable territories that collectively comprised the tribal territory. Leaders at the village, band and tribal levels exercised relatively independent authority over the areas for which they were recognized as leaders. There was no line of authority or chain of command that allowed a leader on one level to overrule or dictate to a leader at a different level and no band, village or other group could be forced to participate in any activities. Leadership was established largely by consensus of the governed. If there was disagreement within the band or village it is likely those wishing to participate would and those who did not, would not. However, in certain contexts such as buffalo hunting, intertribal agreements and war, where quick, decisive action was necessary, a leader could act without consultation.

7. Leaders at all levels would be advised by councils of other prominent individuals from the particular vil-

lage, band or band groups and, at the tribal level, by a council composed of prominent band leaders.

8. There is historical evidence, beginning with the records of Lewis and Clark in 1805, that there were individuals who held the position of head chief over the entire Nez Perce Tribe. Ellis was recognized by the federal government in this capacity from 1842 until his death. For a period following Ellis' death, there is no official record of a federally recognized head chief. Lawyer was later recognized by the federal government as head chief.

9. Old Joseph was one of the leaders of a band of Nez Perce known as the Wal?wama band which was located generally in the area now known as the Wallowa Valley in northeastern Oregon. The written record primarily identifies Old Joseph and later his son Young Joseph as spokespersons for the Wal?wama Band consistent with traditional Nez Perce political organization.

10. Beginning at least as early as the 1830's, the Nez Perce had demonstrated an interest in Christianity and Christian missionaries. By the 1840's a division between Christians and non-Christian factions was evident in the Tribe.

11. During the negotiation of the treaties of 1855 and 1863 the Christian and non-Christian factions were evident.

12. The effects of this Christian and non-Christian division within the Tribes figured in the War of 1877 as well as in Oklahoma among the non-treaty survivors of the war. It was evident in the events surrounding the return of these survivors to the Northwest in 1885.

II. TREATY OF 1855 (12 STAT. 957)

1. The primary purpose of the 1855 Treaty was to extinguish Indian title to certain land and to confine tribal people upon a defined tract of land while, at the

same time, insuring that the traditional hunting, fishing, gathering and pasturage activities could take place as before, including sites both on and off the reservation. The Treaty confirmed Nez Perce title to lands and the resources upon them and recognized the tribe's sovereignty, leaders and government.

2. The Treaty of 1855 was not intended to, nor did it, abolish or abrogate the traditional Nez Perce form of political organization as it existed prior to 1855, nor did it abrogate or abolish the sovereignty of the Nez Perce Tribe.

3. The minutes of the treaty council proceedings held at Walla Walla where the 1855 Treaty was negotiated, indicate that the "following named cheifs (sic), delegates and head men present at the Council, and representing their respective tribes and bands of Indians as below stated. For the Nez Perses (sic): Lawyer, Joseph, U-usune-mal-e-can, James, Timothy, Red Wolfe, Spotted Eagle, Three Feathers, Jason, Jacob, Cow-pook, Is-coh-tim, Kay-kay-map, Tu-per-lan-its-a-kum, Billy, Toh-ton-mol-e-wot, The Snipe, Bold Eagle, and others."

4. Fifty Four individuals signed the 1855 treaty on behalf of the Nez Perce Tribe. Lawyer signed first and Old Joseph signed third.

5. Aboriginal Nez Perce lands comprising some 5.5 million acres were ceded to the United States by this treaty. A reservation was created under its terms that encompassed approximately 7.5 million acres.

6. The federal government viewed the treaty as binding on the members of all villages and bands of the Nez Perce Tribe.

III. TREATY OF 1863 (14 STAT. 647)

1. The primary purpose of the 1863 treaty was to secure the relinquishment of approximately 90% of the land reserved by the Nez Perce Tribe in the 1855 treaty.

The effect was to reduce the size of the Nez Perce reservation from 7.5 million acres to approximately 750,000 acres.

2. From the United States' perspective, this was required as a result of substantial unlawful non-Indian use and occupancy of large portions of the 1855 reservation and the government's inability to adequately protect that reservation against such encroachment. This invasion resulted primarily from the discovery of gold on the Nez Perce Reservation and the desire of the non-Indians to exploit other valuable natural resources located thereon.

3. The 1863 Treaty was negotiated with Lawyer, as head chief and other leaders of the Nez Perce Tribe. This Treaty was initially resisted by most tribal leaders and there was a delay in the execution of the treaty by tribal representatives because of this dissatisfaction. Fifty one individual tribal leaders signed the 1863 treaty on behalf of the Nez Perce Tribe and it appears that at least twenty of them had been signers of the 1855 Treaty.

4. Dissatisfaction with the terms of the 1863 Treaty resulted in some leaders refusing to sign it. A majority of those who refused to sign were leaders of villages and bands situated partly or wholly outside the proposed boundaries of the reservation that would be created by this Treaty although others situated within those boundaries also opposed it. Likewise, representatives of bands and villages with and without the proposed reservation also supported it.

5. Old Joseph did not sign the 1863 Treaty. He is reported to have been so angry with that treaty that he ripped the Treaty into shreds along with his new testament. The territory of the Wal?wama Band was all located outside the boundaries of the Reservation reserved in the 1863 Treaty.

6. Consistent with the general Indian treaty negotiation policy of the United States, the United States fully

expected that all Nez Perce people, including those whose leaders did not sign the 1863 Treaty, would be located on the 1863 reservation.

7. In light of the Treaty reserved rights to hunt, fish and gather food and pasture their horses outside the 1863 reservation, the United States considered the 1863 reservation as being of an adequate size and containing quite adequate resources to accommodate permanent homes for all Nez Perce including those who resided outside its boundaries prior to 1863.

8. There is nothing contained in the 1863 Treaty that affected the rights reserved or set out in the 1855 Treaty except for the reduction in the size of the 1855 reservation.

9. The Nez Perce Tribe was also a party to a third Treaty in 1868 (15 Stat. 693) which was signed by three individuals on behalf of the Nez Perce Tribe and an agreement with the United States dated May 1, 1893. Neither of these documents contain provisions of any relevance to the issues in this case.

IV. JOSEPH

1. Old Joseph, who had signed the 1855 Treaty and had been involved in the 1863 negotiations, died in 1871.

2. After his death, his son, known as Young Joseph, assumed a leadership role in the Wal?wama band. Consistent with the traditional political structure, his area of leadership was in civil matters as opposed to military. His brother, Ollicut, also assumed a leadership position but in military matters and that leadership was exercised in the course of the Nez Perce war although he was not the principal military leader in the war. Looking Glass and Toohoolhoolzote were the principal military leaders until their deaths. Other members of the band would have assumed leadership roles with respect to specific tasks or in response to specific conditions consistent with

Nez Perce tradition. In dealings with the United States, Young Joseph as his father Old Joseph, was considered to be the principal spokesperson of the Wal?wama Band.

V. EXECUTIVE ORDER OF 1873

1. On June 16, 1873, a reservation was created by Executive Order in the Wallowa Valley for "the roaming Nez Perce Indians." The Wal?wama band was among the "roaming Nez Perce Indians" for whom this reservation was created as were the Alpowama Band, the Lamtama Band and others.

2. The 1873 reservation is depicted in *Exhibit B*.

3. The 1873 reservation was not accepted by either the "roaming Nez Perce" or non-Indians. Because, among other things, it did not include all of the territory considered to be necessary by the "roaming Nez Perce", including the Wal?wama Band, they ignored the specific boundaries of the reservation and continued to follow their traditional gathering patterns which involved lands within and without the 1873 reservation. There was opposition from some of the "roaming Nez Perce" like Lamtama and the Alpowama Bands because their traditional lands were not included within the 1873 reservation. The governor of the Oregon Territory expressed vigorous opposition to the proposed reservation on behalf of his non-Indian constituents in the Wallawa area and caused its withdrawal according to some historians.

4. The 1873 reservation contained part, but not all, of the traditional territory of the Wal?wama band of Nez Perce and none of the territory of other displaced Nez Perce bands.

5. The Executive Order that created the 1873 reservation was rescinded in 1875.

6. The Executive Orders of 1873 and 1875 did not affect rights reserved or set out in the Treaties of 1855 or 1863.

VI. NEZ PERCE WAR OF 1877

1. Between 1863 and 1877, the Wal?wama and other bands continued to reside off the reduced Nez Perce reservation in their traditional territory. In May of 1877, Joseph, along with other leaders of Nez Perce bands residing off the reservation, met with General Howard and agreed to move to the Nez Perce reservation. Joseph, and leaders of other bands, had identified lands within the 1863 reservation where they would move.

2. Since 1863, members of the Wal?wama Band had been involved in conflicts with non-Indian settlers in the Wallowa Valley that resulted in deaths. In June of 1877, while attempting to move to the Nez Perce reservation, the Wal?wama and other bands were implicated in violence against non-Indians that has been identified as triggering the Nez Perce War. Joseph and the Wal?wama Band were not responsible for, nor did they participate in, that initial violence. The Wal?wama Band was a participant in the war. Other factors contributing to the conflict included white encroachments on Indian lands, influence of the Dreamer Religion and growing Indian dissatisfaction with the federal government's policies toward the tribes of the northwest. This was the period of major conflicts between Indians and the United States.

3. The warring Nez Perce included at least five bands, one of which was Palus, and some individuals from other tribes including Palus, Cayuse and Umatilla, who joined the war and participated to varying degrees.

4. In the course of the war, Nez Perce war leaders including Looking Glass, Toohoolhoolzote, Hahtalekin, Ollicut and others, were killed. In the absence of war leaders, Joseph along with remaining leaders from other bands assumed responsibility for what remained of the war.

5. The Nez Perce was continued until October 1877 when Joseph surrendered to General Nelson Miles in the

Bear Paws Mountains in Montana. General Miles promised that the surrounding Nez Perce could move to the Nez Perce reservation.

6. The number of Nez Perce who surrendered are estimated at 418, representing 87 men, 184 women and 147 children. A total of 96 Nez Perce men, women and children had been killed in the course of the war.

7. At the end of the war, White Bird, principal leader of the Lamtama band, along with 140 men and boys and 93 women and girls, and some members of other bands, escaped to Canada. A few other individuals may have escaped to different Indian reservations in the northwest and plains. Others were killed by hostile tribes. The remaining warring Nez Perce were sent to Oklahoma contrary to the promises made to Joseph at the time of surrender. In subsequent years, a significant number of those people who escaped to Canada or elsewhere returned to the Nez Perce reservation in Idaho.

8. While in Oklahoma, Joseph and Yellow Bull continued in the role as spokesmen for the Wal?wama Band and those of the Lamtama band that did not escape with White Bird to Canada, respectively, and possibly other individuals. There appear to have been survivors from three or perhaps four Nez Perce bands, including the Wal?wama Band. In addition, there were individuals of other tribes including some Palus people in Oklahoma as a result of the Nez Perce war.

9. In 1883 approximately 30 Nez Perce women and children from various bands were allowed to return to the Nez Perce reservation with James Reuben.

10. The numbers of Nez Perce in Oklahoma by 1885 had been reduced to approximately 268 because of the hostile environment in Oklahoma to which they were not acclimated and because of disease.

11. Approximately one half of the Nez Perce people in Oklahoma accepted Christianity before they returned

to the Northwest in 1885. Although some members of the Wal?wama Band accepted Christianity, the Wal?wama Band was one of the least affected by Christianity and most of its members retained their traditional beliefs.

12. In 1885, as a result of the negotiations of Joseph, leaders on the Nez Perce reservation as well as sympathetic non-Indians, the remaining survivors of the Nez Perce war who had been sent to Oklahoma were allowed to return to the Northwest.

13. Upon their arrival in the northwest the group divided into two groups—those that would go to the Nez Perce reservation and those that would go elsewhere. Agents of the United States had determined it inadvisable for Joseph to return to the Nez Perce reservation because of outstanding indictments against him resulting from the war. Christian leaders also feared his return to the Nez Perce reservation would result in organized resistance to christian influence on the reservation. Joseph had hoped to be able to return to his traditional territory in the Wallowa Valley and he hoped any movement to Colville Reservation to be temporary.

14. Joseph, Yellow Bull and others were initially sent to Fort Spokane. Joseph and his followers moved onto the Colville Reservation at Nespelem, at the invitation of Chief Moses and Tonasket. Yellow Bull and twelve of the sixteen people who had moved with him to Fort Spokane eventually moved to the Nez Perce Reservation at Lapwai. The move of Joseph and his followers was opposed by the Sanpoil, Nespelem and others who viewed them as interlopers. Military troops were summoned by Agent Gwydir to help enforce the settling of the Nez Perce at Colville.

15. Of the 268 people who returned to the Northwest in 1885, 150 moved to Fort Spokane, and then onto the Colville Reservation and 118 returned to the Nez Perce reservation. These numbers did not remain con-

stant in subsequent years as people felt free to move at will.

16. The division of Nez Perce in 1885 between the Nez Perce and Colville reservations is not precise. A substantial number of people who went to Colville with Joseph were part of the Wal?wama band although some followers of Joseph went to the Nez Perce reservation and some people who went to the Nez Perce reservation may have subsequently elected to go to the Colville reservation.

17. In subsequent years, Joseph visited the Nez Perce reservation and also visited the Wallowa Valley but did not move off of the Colville Reservation. He died there in 1904.

VII. NEZ PERCE ON COLVILLE RESERVATION

1. The Nez Perce that came to the Colville Indian Reservation with Chief Joseph in 1885, as well as Nez Perce that may have arrived on the Colville Reservation subsequent to that time have been collectively characterized and referred to by some as the Chief Joseph Band of Nez Perce and by others as the Colville Nez Perce.

2. In part, because they were initially settled and assigned allotments in the Nespelem area, the Nez Perce on the Colville Reservation generally reside in close proximity to each other in and around the town of Nespelem, which became, and is today the Indian Agency for the Colville Reservation.

3. A series of 38 Congressional appropriations passed between 1884 and 1923 refers to appropriations for the Chief Joseph Band of Nez Perce on the Colville Indian Reservation.

4. During his life on the Colville Reservation, Chief Joseph was considered by the United States to be the leader of the Chief Joseph Band of Nez Perce on the Colville Reservation. Upon Chief Joseph's death, leader-

ship of the Chief Joseph Band of Nez Perce succeeded to Albert Waters, followed by Crow Blanket, followed by David Williams through the 1930's.

5. After Chief Joseph's death in 1904, the familiar characterization of the Nez Perce on the Colville Indian Reservation has been the "Chief Joseph Band of Nez Perce".

6. The Nez Perce on the Colville Reservation, and the leaders and chiefs of the Chief Joseph Band of Nez Perce joined with other leaders as outspoken opponents of efforts to organize the Confederated Tribes of the Colville Reservation during the 1930's, were opposed to organization under the Indian Reorganization Act, and were opposed to the ultimately approved constitution and bylaws formalizing the Confederated Tribes of the Colville Reservation. However, since the creation of the Colville Confederated Tribes, Nez Perce people have occupied prominent positions within the tribal government, including the office of tribal chairman.

7. The Chief Joseph Band of Nez Perce was specifically identified in United States correspondence as a group on the Colville Reservation eligible to vote on whether to accept the Indian Reorganization Act for purposes of organizing the government for the Confederated Tribes and Bands situated on the Colville Reservation.

8. The Chief Joseph Band of Nez Perce has consistently been referred to by the United States as one of the constituent bands of the Confederated Tribes of the Colville Reservation.

9. The Nez Perce people on the Colville Reservation have maintained to a high level, their Nez Perce language; specifically instruct their children in Nez Perce customs and culture; and have maintained a close community and unity on the Colville Reservation. In so doing they have maintained close contact and relationship with the Nez Perce on the Nez Perce Reservation

and other Sahaptin groups at Yakima and Umatilla, as evidenced in their ceremonial life and pattern of marriage.

10. The Nez Perce maintain a separate Nez Perce Longhouse on the Colville Reservation located at Nespelem. There is also a specifically designated Nez Perce Cemetery, where Chief Joseph is buried, and where Nez Perce people are customarily buried.

11. The organization of the government of the Colville Confederated Tribes does not distinguish Bands as having separate power, or privilege or representation on the Tribal Council. Representation is by district and the Colville Nez Perce have been located in an area aboriginally owned by the Sanpoil Nespelem.

12. In response to a specific request made by the Nez Perce in discovery, the Colville Confederated Tribes prepared an updated list of persons enrolled in the Colville Confederated Tribes who have Nez Perce blood. That list is *Exhibit C*. The Colville Confederated Tribes and Nez Perce agree that the list is an accurate reflection of the Colville Confederated Tribes records. However, the Nez Perce and Colville Confederated Tribes do not agree on its relevance.

The Colville Confederated Tribes believes that the population of the various Bands in 1991 is not relevant to the question of the existence of treaty fishing rights. It is relevant, if at all, only to show that members can be identified by Band. The population figures may be relevant to questions that may later arise as to who can fish and where.

The Nez Perce Indians believe that the document is relevant to give the Court a perspective on the relative size of the Colville Nez Perce to the Confederated Tribes and the Nez Perce Tribes (Idaho), and is relevant to the issue of continuity.

As such, the Colville Confederated Tribes reserves the right to object to the use and admissibility of the 1991 population figures.

Consistent with the above reservation of rights, the list identifies 502 members of the as being Colville Nez Perce. Eighty nine (89) are less than ¼ degree Nez Perce blood, 413 are ¼ degree Nez Perce or greater, and 44 are full blood Nez Perce. According to Colville Tribal enrollment records 169 of the 502 have current mailing addresses that show an off Reservation address. The total tribal population for the Colville Confederated Tribes as of 1991 is 7,585, and for the Nez Perce Tribes is 3,920. All of the persons shown in *Exhibit C* are enrolled members of the Colville Confederated Tribes.

13. A person may be enrolled as a member of the Colville Confederated Tribes if they have one-quarter (¼) degree of Indian blood from any combination of the eleven tribes that comprise the Colville Confederated Tribes.

14. *Exhibit D* is a list that depicts which tribal backgrounds are represented by the "other" blood quanta shown on *Exhibit C*.

15. To be a member of the Nez Perce Tribe a person needs to have ¼ degree blood of Nez Perce. As a result, Nez Perce members are not all full blood Nez Perce, some have non-Indian blood and others have Indian blood from other Indian tribes.

16. To retain membership in the Nez Perce Tribe a person does not have to reside on the Nez Perce Reservation, and members of the Nez Perce Tribe do reside off the Nez Perce Reservation.

17. The Nez Perce Tribe's enrollment Ordinance allows persons who are at least one-quarter (¼) degree Nez Perce blood and who are not members of any other tribe to become enrolled in the Nez Perce Tribe.

18. Bands are no longer of significance in the Nez Perce political structure. Tribal government is now conducted under a federally approved Constitution and By-Laws by the Nez Perce Tribal Executive Committee, the

nine members of which are elected from the tribal membership at large.

19. As a result of the interrelationship between tribes on the Plateau, there are some members of modern tribes who would also qualify for membership in another modern tribe.

APPENDIX 2

Colville-Yakima Agreed Facts

AGREED FACTS

1. The Chelan, Wenatchi, Entiat, Columbia and Palus Tribes were each party to the Yakima Treaty of June 9, 1855 which was entered into a Walla Walla, Washington, territory.[1]

2. The Yakima Nation which was created by and named in the preamble to the Treaty of 1855 is not synonymous with the Yakima Tribe and does not exist as an entity today.

3. The Chelan, Wenatchi, Entiat, Columbia and Palus Tribes and the Kittitas, Wanapam, Yakima, Klickitat, Wishram, and Skeen Tribes are successors to the "Yakima Nation" identified in the preamble to the 1855 Treaty.

4. There was no movement as a tribe by either the Chelan, Wenatchi, Entiat, Columbia or Palus Tribes onto the Yakima Reservation although individual members of the tribes did move to that reservation.

5. A significant number of Indians who were members of the Chelan, Wenatchi, Entiat, Columbia or Palus Tribes moved onto the Colville Reservation.

6. The Colville Tribes represent the tribal interests of the Chelan, Columbia, Wenatchi, Entiat and Palus tribes for the purpose of allocating the monetary damage award for undercompensated lands under the Treaty of 1855.

7. The Confederated Tribes of the Colville Reservation and the Confederated Tribes and Bands of the

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[1] These allegations are part of the Court's ruling on Summary Judgment. The Yakima Indian Nation does not accept them as "agreed facts", but states that they are an accurate reflection of the Court's Order. This statement applies to Agreed Facts number 1 through 6 as if separately set out in each of those facts.

Yakima Nation are both federally recognized Indian tribes.

8. The Confederated Tribes of the Colville Reservation governs under a Constitution and Bylaws ratified on February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

9. The Constitution and Bylaws of the Confederated Tribes of the Colville Reservation is silent with respect to the treaty rights now claimed by Colville.

10. The Commissioner's approval of the Colville Tribal Constitution and Bylaws states as follows: "This Constitution and Bylaws having been proposed and duly ratified by the Indians of the Colville Reservation on February 26, 1938, at a referendum called by me, is herewith approved." signed John Collier, Commissioner of Indian Affairs.

11. The 1872 Executive Order establishing the Colville Reservation is silent as to off-reservation fishing rights.

12. The Colville Reservation was set aside by Executive Order on July 2, 1872 for "said Indians and for such other Indians as the Department of Interior may see fit to locate thereon".

13. The enrollment of the Confederated Tribes of the Colville Reservation is approved by the United States Bureau of Indian Affairs.

14. The Confederated Tribes of the Colville Reservation exercises aspects of sovereignty over its territory through its Tribal institutions that provide services including, but not limited to law enforcement; trial and appellate courts; probation and parole services; child welfare protection; management of fish and game including operation of the Tribal hatchery; social welfare including alcohol and drug treatment; adolescent residential care; basic and higher education services; care of the elderly; mental

health counseling; and, protection of the environment including protection of water, and air, zoning, and land use regulation.

15. In Indian Claims Docket 181-C, the Colville Confederated Tribes sought compensation for damages suffered to fishing rights on or adjacent to the Colville Reservation.

16. Kettle Falls was a primary fishery for the aboriginal Colville, Lake, Nespelem, San Poil and Okanogan as well as others. These tribes also had significant fisheries at other locations on or adjacent to the 1872 Colville Reservation.

17. There is no federal enrollment statute which sets forth the criteria for enrollment in the Colville Confederated Tribes; criteria is set forth in the Colville Confederated Tribes' federally approved Constitution.

18. Enrollment in the Colville Confederated Tribes is determined pursuant to amendments III, V, and IX, to the Colville Tribal Constitution, all of which have been approved by either the Commissioner of Indian Affairs or the Secretary of Interior.

19. The Yakima Nation has an Enrollment Act (25 U.S.C. § 601 *et seq.*) passed by Congress that governs enrollment in the Yakima Nation.

20. John Harmilt was a Chief of the Wenatchi.

21. In 1896, the United States Government purchased the lands of the Wenatshapam Fishery reserved under Article X of the Yakima Treaty. The funds from that purchase were used to develop the Yakima Indian Reservation irrigation project and to provide direct payment to Wenatchi Indians who lived at or near the Wenatshapam Fishery. The agreement for the purchase of the Wenatshapam Fishery also included provision to allot the Wenatchi Indians living at or near the sale of the Wenatshapam Fishery in the area of the fishery on the Wenatchee river.

22. In the 1930's many chiefs and Indian elders on the Colville Reservation were opposed to the proposed change from a traditional Indian method of choosing leaders and government and the organization of a new governmental structure on the Colville Reservation.

23. At the time of the confederation of tribes on the Colville Reservation, John Harmilt had an allotment on the Colville Reservation and a homestead near Cashmere, Washington where he died.

24. The United States appropriated funds to assist in the removal of the Wenatchi people to the Colville Reservation. A portion of these funds was spent to improve Wenatchi homesteads near Cashmere, Washington.

25. After the 1883 Agreement negotiated by Moses, Tonasket, Sarsarpkin and Lot, returning the Moses Reservation to the public domain and allowing Moses and his people to move to the Colville Reservation or accept allotments on the former Moses Reservation, the Chelan refused to accept allotment on the former Moses Reservation or to initially move to the Colville Reservation. Later, the Chelan people were forcibly moved to the Colville Reservation and their leaders, including Chief Long Jim, were briefly jailed.

26. Chief Long Jim, after being forced to go to the Colville Reservation, and following his release from jail on the Colville Reservation returned to the former Moses Reservation and ultimately received an allotment on the former Moses Reservation.

27. Entiat tribal members received allotments on the former Moses Reservation pursuant to the terms of the 1883 Agreement returning the Moses Reservation to the public domain.

28. In 1878 an agreement was reached with Chief Moses, which agreement was ratified by Congreess on April 19, 1879 where a reservation (Moses Reservation) was established for Moses and his people.

29. The Moses Reservation ratified by Congress eventually included the aboriginal Chelan territory, and was adjacent to the aboriginal territories of the Columbia, Entiat and Wenatchi.

30. Chief Moses was the chief of the Columbia and was recognized and treated by the United States as the leader and spokesperson for the Wenatchi, Entiat, Columbia and Chelan with substantial authority with respect to them, not all of them acknowledged Moses as their leader.

31. The United States negotiated with Chief Moses as the representative of the Wenatchi, Columbia, Entiat, and Chelan for the purpose of setting aside a separate reservation within the territory of each.

32. The reservation originally requested by Chief Moses included some of the territory of the Wenatchi, Columbia, Entiat and Chelan, but was not approved by the United States.

33. In 1883, Chief Moses along with Chiefs Sarsarpkin, Lot and Tonasket negotiated with the United States to restore the Moses Reservation to the public domain and allow Moses and his people, whom Moses and the United States understood to include Chelan, Wenatchi, Entiat and Columbia to either take allotments on the Moses Reservation or remove to the Colville Reservation.

34. Moses had wives from several different tribes. This practice of marriage was a part of the Plateau culture. It is likely that Moses spoke and understood several Indian languages and some English.

35. Moses was on friendly relations with General Howard, with whom he corresponded in letters written in English over a number of years. It is likely that they considered each other friends.

36. Moses took three trips to Washington, D.C., where he negotiated both with the president of the United States,

the Secretary of the Interior and the Department of the Army.

37. The movement of Moses and his people onto the Colville Reservation following the 1883 Agreement was opposed by many other Indians already resident thereon, particularly by the San Poil and Nespelem.

38. The resentment against Moses and his people moving onto the Colville Reservation in 1883 carried on for many years.

39. The 1879 Order establishing the Moses Reservation, the 1880 Executive Order enlarging the Moses Reservation to include all of Lake Chelan, the 1883 Agreement eliminating a fifteen (15) mile strip on the northern boundary of the Moses Reservation and the 1883 Agreements all negotiated by Moses as spokesman for his people are silent on the issue of any rights retained in any treaty with the United States.

40. The Palus spoke Sahaptin.

41. At the time of the 1855 Treaty, the village was the principal political unit of the Wenatchi, Columbia, Entiat Chelan and Palus.

42. Villages along the same watercourse generally had a common language and customs and people from the villages would interrelate for some purposes.

43. Those Indians who would be able to exercise treaty fishing rights as a result of this case are enrolled members of the Colville Confederated Tribes.

APPENDIX D

[Filed Dec. 23, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-35150
DC No. CV-68-00513-MFM
(District of Oregon)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
and

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON; CONFEDERATED TRIBES OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION; NEZ PERCE TRIBE; and the SHOSHONE-BANNOCK TRIBES,
Plaintiffs/Intervenors/Appellees,

v.

STATE OF OREGON; STATE OF WASHINGTON,
Defendants,

v.

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
Plaintiff/Intervenor/Appellant.

ORDER

Before: BROWNING, SCHROEDER, and HALL, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

TREATY WITH THE YAKIMA, 1855.

Articles of agreement and convention made and concluded at the treaty-ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakima, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kah-milt-path, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

ARTICLE 1. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

Commencing at Mount Ranier, thence northerly along main ridge of the Cascade Mountains to the point where the nothern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes, (119° 10′,) which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south

course to the forty-seventh (47°) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southesterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Percé tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "La Lac;" thence southerly to a point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

ARTICLE 2. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit: Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klick-atat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence

along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE 3. *And provided,* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way,

with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE 4. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: Sitxty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: For the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year; and for the next five years, four thousand dollars per year.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall

each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE 5. The United States futher agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an argicultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin-shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and

bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land. The said salarly to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakima Nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and band of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE 7. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves

to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. *And provided*, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may

direct, and be subject to the same provisions and restrictions as other Indian reservations.

ARTICLE 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,
Governor and Superintendent. [L. S.]

Kamaiakun, his x mark.	[L.S.]	Wish-och-kmpits, his x mark.	[L.S.]
Skloom, his x mark.	[L.S.]	Koo-lat-toose, his x mark.	[L.S.]
Owhi, his x mark.	[L.S.]	Shee-ah-cotte, his x mark.	[L.S.]
Te-cole-kun, his x mark.	[L.S.]	Tuck- quille, his x mark.	[L.S.]
La-hoom, his x mark.	[L.S.]	Ka-loo-as, his x mark.	[L.S.]
Me-ni-nock, his x mark.	[L.S.]	Scha-noo-a, his x mark.	[L.S.]
Elit Palmer, his x mark.	[L.S.]	Sla-kish, his x mark.	[L.S.]

Signed and sealed in the presence of—

James Doty, secretary of treaties,
Mie. Cles. Pandosy, O. M. T.,
Wm. C. McKay,
W. H. Tappan, sub Indian agent, W. T.,
C. Chirouse, O. M. T.,
Patrick McKenzie, interpreter,
A. D. Pamburn, interpreter,
Joel Palmer, superintendent Indian affairs, O. T.,
W. D. Biglow,
A. D. Pamburn, interpreter.

APPENDIX F

TREATY WITH THE NEZ PERCÉS, 1855.

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, in the Walla-Walla Valley, this eleventh day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and Joel Palmer, superintendent of Indian affairs for Oregon Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the Nez Percé tribe of Indians occupying lands lying partly in Oregon and partly in Washington Territories, between the Cascade and Bitter Root Mountains, on behalf of, and acting for said tribe, and being duly authorized thereto by them, it being understood that Superintendent Isaac I. Stevens assumes to treat only with those of the above-named tribe of Indians residing within the Territory of Washington, and Superintendent Palmer with those residing exclusively in Oregon Territory.

ARTICLE 1. The said Nez Percé tribe of Indians hereby cede, relinquish and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit: Commencing at the source of the Wo-na-ne-she or southern tributary of the Palouse River; thence down that river to the main Palouse; thence in a southerly direction to the Snake River, at the mouth of the Tucanon River; thence up the Tucanon to its source in the Blue Mountains; thence southerly along the ridge of the Blue Mountains; thence to a point on Grand Ronde River, midway between Grand Ronde and the mouth of the Woll-low-how River; thence along the divide between the waters of the Woll-low-how and Powder River; thence to the crossing of Snake River, at the mouth of Powder River; thence to the Salmon River, fifty miles above the

place known [as] the "crossing of the Salmon River;" thence due north to the summit of the Bitter Root Mountains; thence along the crest of the Bitter Root Mountains to the place of beginning.

ARTICLE 2. There is, however, reserved from the lands above ceded for the use and occupation of the said tribe, and as a general reservation for other friendly tribes and bands of Indians in Washington Territory, not to exceed the present numbers of the Spokane, Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians, the tract of land included within the following boundaries, to wit: Commencing where the Moh ha-na-she or southern tributary of the Palouse River flows from the spurs of the Bitter Root Mountains; thence down said tributary to the mouth of the Ti-nat-pan-up Creek; thence southerly to the crossing of the Snake River ten miles below the mouth of the Al-po-wa-wi River; thence to the source of the Al-po-wa-wi River in the Blue Mountains; thence along the crest of the Blue Mountains; thence to the crossing of the Grand Ronde River, midway between the Grand Ronde and the mouth of the Woll-low-how River; thence along the divide between the waters of the Woll-low-how and Powder Rivers; thence to the crossing of the Snake River fifteen miles below the mouth of the Powder River; thence to the Salmon River above the crossing; thence by the spurs of the Bitter Root Mountains to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservaiton without permission of the tribe and the superintendent and agent; and the said tribe agrees to remove to and settle upon the same within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not

in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant, guarantying, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. And provided that any substantial improvement heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation, and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of equal value shall be furnished him as aforesaid.

ARTICLE 3. And provided that, if necessary for the public convenience, roads may be run through the said reservation, and, on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them, as also the right, in common with citizens of the United States, to travel upon all public highways. The use of the Clear Water and other streams flowing through the reservation is also secured to citizens of the United States for rafting purposes, and as public highways.

The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE 4. In consideration of the above cession, the United States agree to pay to the said tribe in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say, sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reserve, breaking up and fencing farms, building houses, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: for the first five years after the ratification of this treaty, ten thousand dollars each year, commencing September 1, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand each year, and for the next five years, four thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE 5. The United States further agree to establish, at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping the same in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of said tribe, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tinshop and to the other a gunsmith's shop; one carpenter's

shop, one wagon and plough maker's shop, and to keep the same in repair, and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair, and furnished with the necessary tools and fixtures, and to employ two millers; to erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide with the necessary furniture the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the tribe is expected, and will be called upon, to perform many services of a public character, occupying much of his time, the United States further agrees to pay to the Nez Percé tribe five hundred dollars per year for the term of twenty years, after the ratification hereof, as a salary for such person as the tribe may select to be its head chief. To build for him, at a suitable point on the reservation, a comfortable house, and properly furnish the same, and to plough and fence for his use ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may be elected to that position by his tribe, and no longer.

And all the expenditures and expenses contemplated in this fifth article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said tribe, nor shall the cost of transporting the goods for the annuity-payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE 6. The President may from time to time, at his discretion, cause the whole, or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said tribe as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas in the year 1854, so far as the same may be applicable.

ARTICLE 7. The annuities of the aforesaid tribe shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid tribe acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the Government of the United States, or its agent, for decision, and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory of Washington, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribe agrees not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The Nez Percés desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservation, or who

drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. The Nez Percé Indians having expressed in council a desire that William Craig should continue to live with them, he having uniformly shown himself their friend, it is further agreed that the tract of land now occupied by him, and described in his notice to the register and receiver of the land-office of the Territory of Washington, on the fourth day of June last, shall not be considered a part of the reservation provided for in this treaty, except that it shall be subject in common with the lands of the reservation to the operations of the intercourse act.

ARTICLE 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and Joel Palmer, superintendent of Indian affairs for Oregon Territory, and the chiefs, headmen, and delegates of the aforesaid Nez Percé tribe of Indians, have hereunto set their hands and seals, at the place, and on the day and year hereinbefore written.

Isaac I. Stevens, [L. S.]
Governor and Superintendent Washington Territory.

Joel Palmer, [L. S.]
Superintendent Indian Affairs.

Aleiya, or Lawyer, Head-chief of the Nez Percés,	[L.S.]	Tippelanecbupooh, his x mark.	[L.S.]
Appushwa-hite, or Looking-glass, his x mark.	[L.S.]	Hah-hah-stilpilp, his x mark.	[L.S.]
		Cool-cool-shua-nin, his x mark.	[L.S.]

Joseph, his x mark. [L.S.]
James, his x mark. [L.S.]
Red Wolf, his x mark. [L.S.]
Timothy, his x mark. [L.S.]
U-ute-sin-male-cun, his x mark. [L.S.]
Spotted Eage, his x mark. [L.S.]
Stoop-toop-nin or Cut-hair, his x mark. [L.S.]
Tah-moh-moh-kin, his x mark. [L.S.]
Speaking Eagle, his x mark. [L.S.]
Wat-ti-wat-ti-wah-hi, his x mark. [L.S.]
Howh-no-tah-kun, his x mark. [L.S.]
Tow-wish-wane, his x mark. [L.S.]
Wahpt-tah-shooshe, his x mark. [L.S.]
Bead Necklace, his x mark. [L.S.]
Koos-koos-tas-kut, his x mark. [L.S.]
Levi, his x mark. [L.S.]
Pee-oo-pe-whi-hi, his x mark. [L.S.]
Pee-oo-pee-iecteim, his x mark. [L.S.]
Pee-poome-kah, his x mark. [L.S.]
Hah-hah-stlil-at-me, his x mark. [L.S.]
Wee-yoke-sin-ate, his x mark. [L.S.]
Wee-ah-ki, his x mark. [L.S.]
Necalahtsin, his x mark. [L.S.]
Suck-on-tie, his x mark. [L.S.]
Ip-nat-tam-moose, his x mark. [L.S.]
Jason, his x mark. [L.S.]
Silish, his x mark. [L.S.]
Toh-toh-molewit, his x mark. [L.S.]
Tuky-in-lik-it, his x mark. [L.S.]
Te-hole-hole-soot, his x mark. [L.S.]
Ish-coh-tim, his x mark. [L.S.]
Wee-as-cus, his x mark . [L.S.]
Hah-hah-stoore-tee, his x mark. [L.S.]
Eee-maht-sin-pooh, his x mark. [L.S.]
Tow-wish-au-il-pilp, his x mark. [L.S.]
Kay-kay-mass, his x mark. [L.S.]
Kole-kole,til-ky, his x mark. [L.S.]
In-mat-tute-kah-ky, his x mark. [L.S.]
Moh-see-chee, his x mark. [L.S.]
George, his x mark. [L.S.]
Nicke-el-it-may-ho, his x mark. [L.S.]
Say-i-ee-ouse, his x mark. [L.S.]
Wis-tasse-cut, his x mark. [L.S.]
Ky-ky-soo-te-lum, his x mark. [L.S.]
Ko-ko-whay-nee, his x mark. [L.S.]
Kwin-to-kow, his x mark. [L.S.]
Pee-wee-au-ap-tah, his x mark. [L.S.]
Wee-at-tenat-il-pilp, his x mark. [L.S.]
Pee-oo-pee-u-il-pilp, his x mark. [L.S.]
Wah-tass-tum-mannee, his x mark. [L.S.]
Tu-wee-si-ce, his x mark. [L.S.]
Lu-ee-sin-kah-koose-sin, his x mark. [L.S.]
Hah-tal-ee-kin, his x mark. [L.S.]

Signed and sealed in presence of us—

James Doty, secretary of treaties, W.T.
Wm. C. McKay, secretary of treaties, O. T.
W. H. Tappan, sub-Indian agent,
William Craig, interpreter,
A. D. Pamburn, interpreter,
Wm. McBean,
Geo. C. Bomford,
C. Chirouse, O. M. T.
Mie. Cles. Pandosy,
Lawrence Kip,
W. H. Pearson.

APPENDIX G

Colville Reserve.

[Area, 2,031¼ square miles; act of July 1, 1892 (27 Stat., 62); February 20, 1896 (29 Stat., 9); July 1, 1898 (30 Stat., 593), and proclamation April 10, 1900.]

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., April 8, 1872.

SIR: I have the honor to invite your attention to the necessity for the setting apart by Executive order of a tract of country hereinafter described, as a reservation for the following bands of Indians in Washington Territory, not parties to any treaty, viz:

The Methow Indians, numbering	316
The Okanagan Indians, numbering	340
The San Poel Indians, numbering	538
The Lake Indians, numbering	230
The Colville Indians, numbering	691
The Calispel Indians, numbering	420
The Spokane Indians, numbering	725
The Coeur d' Alène Indians, numbering	700
And scattering bands	300
Total	4,200

* * * Excluding that portion of the tract of country referred to found to be in the British possessions, the following are the natural boundaries of the proposed reservation, which I have the honor to recommend be set apart by the President for the Indians in question, and such others as the Department may see fit to settle thereon, viz: Commencing at a point on the Columbia where the Spokane River empties in the same; thence up the Columbia River to where it crosses the forty-ninth parallel north latitude; thence east with said forty-ninth parallel to where the Pend d'Oreille or Clark River crosses the same; thence up the Pend d'Oreille or Clark

River to where it crosses the western boundary of Idaho Territory, the one hundredth and seventeenth meridian west longitude; thence south along said one hundredth and seventeenth meridian, to where the Little Spokane River crosses the same; thence southwesterly, with said river, to its junction with the Big Spokane River; thence down the Big Spokane River to the place of beginning.

The papers hereinbefore referred to are respectfully submitted herewith.

Very respectfully, your obedient servant,

F. A. WALKER, *Commissioner.*

The SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 9, 1872.

SIR: I have the honor to submit herewith a communication dated the 8th instant, from the Commissioner of Indian Affairs, and accompanying papers, representing the necessity for the setting apart, by Executive order, of a tract of country therein described for certain bands of Indians in Washington Territory not parties to any treaty.

The recommendation of the Commissioner in the premises is approved, and I respectfully request that the President direct that the tract of country designated upon the inclosed map be set apart for the Indians referred to, and such others as this Department may see fit to settle thereon.

I am, sir, very respectfully, your obedient servant,

B. R. COWEN, *Acting Secretary.*

To the PRESIDENT.

EXECUTIVE MANSION, *Washington, April 9, 1872.*

It is hereby ordered that the tract of country referred to in the within letter of the Acting Secretary of the Interior, and designated upon the accompanying map, be set apart for the bands of Indians in Washington Territory named in communication of the Commissioner of Indian Affairs dated the 8th instant, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U. S. GRANT.

EXECUTIVE MANSION, *Washington, July 2, 1872.*

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River, on the west by the Okanagan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U. S. GRANT.

APPENDIX H

7 4786-37
FHD

Mr. C. B. Snezen Timentoe,
Malott, Washington.

[Dec. 29, 1937]

Dear Mr. Timentoe:

We have received a petition signed by you and bearing the names of other members of the Colville Tribe protesting against what is termed "the New Deal" and the proposed constitution and by-laws for the Colville Tribe. You insist on continuing under your own laws.

The constitution and by-laws as worked out by the committee of Colville Indians does not interfere with any of your treaty or constitutional rights. It simply provides a plan or program for electing a representative council which is to act and speak for the Indians of the Colville Reservation. This constitution does not come under the new deal as you choose to call the Indian Reorganization Act. The Indians of Colville voted to exclude themselves from that act and there is no way except by authority of Congress for you to be brought under that act. This constitution does not put you under the Indian Reorganization Act.

There is some misunderstanding of the constitution and its purpose and, therefore, I am sending Superintendent Meyer a copy of this letter and asking him to meet with you and those who signed this petition so that he might further explain the matter to you.

Sincerely yours,

(Signed) John Collier
Commissioner

cc—Colville Agency.
George P. LaVatta.

Supreme Court, U.S.
FILED
MAY 4 1995
OFFICE OF THE CLERK

No. 94-1567

In The

Supreme Court of the United States

October Term, 1994

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Petitioner,

v.

THE YAKIMA INDIAN NATION, THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS RESERVATION OF OREGON, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, THE NEZ PERCE TRIBE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NEZ PERCE TRIBE AND CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS RESERVATION OF OREGON IN OPPOSITION TO COLVILLE'S PETITION FOR WRIT OF CERTIORARI

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether an Indian tribe that is not a party to any treaty is entitled to exercise off-reservation fishing rights reserved by two other Indian tribes in treaties with the United States because some members of the non-treaty tribe have ancestors who were members of the treaty tribes?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THIS CASE DOES NOT MEET ANY OF THE CRITERIA THAT TRADITIONALLY JUSTIFY DISCRETIONARY REVIEW BY THIS COURT ... 4

A. The facts and issues in this case limit its significance to the parties involved 4

B. The decisions of the district and circuit courts below are not inconsistent with any prior decision of this Court 6

C. Review of this decision will be of no instructive value to lower courts 9

COLVILLE MISCHARACTERIZES AND MISREPRESENTS THE HOLDINGS OF THE COURTS BELOW 10

A. The Issue presented by Colville's Motion to Intervene was whether Colville was a successor in interest to rights under the Yakima and Nez Perce treaties and the District and Circuit Courts both ruled squarely on that issue 11

B. Colville's issue statement invites this Court to make an erroneous factual assumption .. 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 4

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 4

The Confederated Tribes of the Colville Reservation as Representative of the Joseph Band of the Nez Perce Tribe v. The United States, 25 Indian Claims Commission 99, Docket No. 196 (1971) 16

United States v. Oregon, 122 F.R.D. 571 (D. Ore. 1988) 2

United States v. Oregon, 302 F.Supp. 899 (D. Ore. 1969) 1, 2

United States v. Oregon, 529 F.2d 570 (9th Cir. 1976) 2

United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981) 2

United States v. Oregon, 666 F.Supp. 1461 (D. Ore. 1987) 2

United States v. Oregon, 699 F.Supp. 1456 (D. Ore. 1988) 2

United States v. Oregon, 718 F.2d 299 (9th Cir. 1983) 2

United States v. Oregon, 745 F.2d. 550 (9th Cir. 1984) 2

United States v. Oregon, 769 F.2d 1410 (9th Cir. 1985) 2

United States v. Oregon, 913 F.2d 576 (9th Cir. 1990) 2

United States v. Suquamish Indian Tribe, 901 F.2d 772 (9th Cir. 1990) 8, 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974) 5, 9

United States v. Washington, 476 F.Supp. 1101 (W.D. Wash. 1979) 5, 13

United States v. Washington, 520 F.2d 676 (9th Cir. 1975) 5, 8, 9

United States v. Washington, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1142, 1025 S.Ct. 1001, 71 L.Ed.2d 294 (1982) 8, 9, 17

United States v. Washington, 626 F.Supp. 1405 (W.D. Wash. 1985) 6

W.W. Wolverton v. United States, 29 Ct. Cl. 107 (1984) 16

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) ... 6, 8

OTHER AUTHORITIES

13 Moore's Federal Practice § 810.45 8

Treaty of June 9, 1855, 12 Stat. 951 1

Treaty of June 11, 1855, 12 Stat. 957 1

Treaty of June 25, 1855, 12 Stat. 963 6

STATEMENT OF THE CASE

In 1855, the United States entered into treaties with the Yakima Nation, Treaty of June 9, 1855, 12 Stat. 951, Petition, Appendix E, pp. 68a - 75a,[1] and Nez Perce Tribe, Treaty of June 11, 1855, 12 Stat. 957, Petition, Appendix F, pp. 76a - 83a. In Article III of these treaties, the Yakima and Nez Perce tribes specifically and expressly reserved the right to fish at all of their "usual and accustomed [fishing] places" outside their reservations. *Id.* From that time to the present, these tribal entities have continued to exercise, regulate and protect their treaty reserved rights to fish. Petition, Appendix C, pp. 41a - 44a.

This case, *United States v. Oregon*, Civ. No. 68-513-MA, was originally brought in 1968 by "the United States on its own behalf and on behalf of the Confederated Tribes and Bands of the Yakima Reservation, the Confederated Tribes and Bands of the Umatilla Reservation . . . , the Nez Perce Indian Tribe and 'all other tribes similarly situated . . . ' " *United States v. Oregon*, 302 F.Supp. 899, 904 (D. Or. 1969). The Warm Springs, Yakima, Umatilla and Nez Perce tribes all sought, and were granted, permission to intervene on their own behalf. *Id.* "Following the intervention of the Warm Springs Tribe and upon the inability of government counsel to identify any other tribes who were 'similarly situated,' the State's motion to

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[1] Copies of the Yakima and Nez Perce Treaties, the opinions of the District Court and Court of Appeals, and other orders and documents were attached as appendices to Colville's Petition for a Writ of Certiorari. Citations to those documents in this brief are to the appendix designation of those documents and their page number in the Petition.

strike the reference to such other tribes was granted." *Id.* All four of the intervening tribes were parties to treaties with the United States which contain "substantially identical" provisions reserving off reservation fishing rights. *Id.* The purpose of this case was to define the nature and extent of those treaty reserved fishing rights in the Columbia River. *Id.* at 903-4. This case has been under the continuing jurisdiction of the court since the first opinion was rendered in 1969.[2] Since that time, numerous issues have been adjudicated by the district court and Ninth Circuit.[3]

The Confederated Tribes of the Colville Reservation was established as a tribal entity by the 1938 confederation of eleven different tribes, bands and groups that were located on the Colville Reservation. Petition, Appendix C, pp. 28a - 29a. The Confederated Tribes of the Colville Reservation has never been a party to a treaty with the United States. The Colville Indian Reservation was created "for certain bands of Indians in Washington Territory *not parties to any treaty*." Petition, Appendix G,

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[2] A historical background of this case since that time is contained in the District Court's opinion reported at 122 F.R.D. 571 (D. Ore. 1988).

[3] Reported decisions include the following: 529 F.2d 570 (9th Cir. 1976); 657 F.2d 1009 (9th Cir. 1981); 718 F.2d 299 (9th Cir. 1983); 745 F.2d. 550 (9th Cir. 1984); 769 F.2d 1410 (9th Cir. 1985); 666 F.Supp. 1461 (D. Ore. 1987); 699 F.Supp. 1456 (D. Ore. 1988); 122 F.R.D. 571 (D. Ore. 1988); 913 F.2d 576 (9th Cir. 1990). In addition, the District Court docket sheet reflects the multitude of unpublished orders that have been rendered over the 26 year history of this case.

pp. 86a - 87a, emphasis supplied. Colville's first involvement in Columbia River treaty fishing issues occurred in 1989 when it filed its motion to intervene in this case claiming to be a successor in interest to rights under the Yakima and Nez Perce treaties. "Colville has not explained why it waited over twenty years after *United States v. Oregon* was initiated" to seek intervention. Petition, Appendix A, p. 3a.

After trial, District Court Judge Marsh made extensive findings of fact and conclusions of law and in his March 16, 1992, opinion, held that Colville had failed to establish that it was the successor to, and present day holder of, rights reserved in the 1855 Yakima and Nez Perce treaties. Petition, Appendix C, pp. 15a - 44a. Colville appealed to the Ninth Circuit Court of Appeals where the decision of the district court was affirmed in an opinion dated June 23, 1994. Petition, Appendix A, pp. 1a - 12a. Thereafter, Colville filed a petition for rehearing with a suggestion for rehearing en banc. The petition was denied and the suggestion for rehearing en banc was rejected by order of the court filed December 23, 1994. Petition, Appendix D, pp. 66a - 67a. Shortly thereafter, on December 28, 1994, the Ninth Circuit entered an order amending its opinion in two respects. Petition, Appendix B, pp. 13a -14a. Colville now seeks review by this Court.

SUMMARY OF ARGUMENT

This case is premised upon complex facts which are unique and specific to the parties. Moreover, the legal issue, which is directly tied to those facts, is likely to have

no application beyond this case. Contrary to Colville's characterization of the issues, the decisions of the courts below are not in conflict with any decisions of this Court. Consequently, Colville's petition does not meet any of the criteria which support granting a petition for writ of certiorari.

ARGUMENT

THIS CASE DOES NOT MEET ANY OF THE CRITERIA THAT TRADITIONALLY JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

The rules and decisions of this Court define those instances in which petitions for writs of certiorari are typically granted. This case meets none of those criteria.

A. The facts and issues in this case limit its significance to the parties involved.

By rule of this Court, "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Rule 10, Rules of the Supreme Court of the United States. The concept of importance in this context means the importance of the issues "to the public as distinguished from" importance to the parties to the case. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). In addition, this Court has held that to warrant review, the problem must be "beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Neither of these criteria are met here.

The legal issue presented to the district court by Colville was aptly characterized by the court as "unique." Petition, Appendix C, p. 39. In attempting to establish itself as a treaty tribe, Colville forged an "amalgam of arguments" from determinations of treaty tribe status in several other cases contending that its constituent tribes were distinct tribal entities which had also merged into the Colville Confederacy - an argument the district court found "becomes inconsistent with itself." Petition, Appendix C, p. 40a. Colville's amalgam of theories was necessitated by the fact that no previous case had ever involved the type, number and interrelationships of parties as are involved here. Indeed, the prospect of any future litigation over treaty tribe status is extremely unlikely at this point in time because that determination was most obviously made at the time treaties were executed and a number of truly ambiguous situations were resolved in *United States v. Washington*. *See, e.g.*, 384 F.Supp. 312 (W.D. Wash. 1974); 520 F.2d 676 (9th Cir. 1975); 476 F.Supp. 1101 (W.D. Wash. 1979). While the legal issue in this case is of monumental significance to the parties, its application is limited by the unique facts upon which it is premised. Consequently, it does not rise to the level of importance defined for purposes of review by this Court.

The facts in this case defy duplication. Four Indian tribes are active parties in this proceeding. The Confederated Tribes of the Colville Reservation is comprised of eleven different tribes, bands and groups. Petition, Appendix C, p. 29a. The Confederated Tribes and Bands of the Yakima Indian Nation is comprised of some 14 different Indian tribes and bands. Petition, Appendix C,

p. 16a. The Confederated Tribes of the Warm Springs Reservation of Oregon is the successor in interest to seven tribes and bands that were signatory to the Treaty with the Tribes of Middle Oregon of June 25, 1855. 12 Stat. 963. The Nez Perce Tribe and each of the tribes, bands and groups of Indians that are part of the Yakima, Warm Springs and Colville Confederations have their own unique histories and cultures. In addition, each has a differing history of relationships with the United States and with each other as is aptly demonstrated by the facts agreed to and found by the district court. Petition, Appendix C, pp. 22a - 30a, 45a - 65a. The nature of the facts here limits the application of the decisions below to the parties here.

Colville's petition does not meet the criteria established by Rule 10 and the decisions of this Court for granting petitions for writs of certiorari because the mostly historical facts in this case are limited to the present parties, the legal issue involved is tied directly to those facts and its application beyond the present parties is extremely unlikely.

B. The decisions of the district and circuit courts below are not inconsistent with any prior decision of this Court.

Colville attempts to persuade this Court that the lower courts' decisions in this case conflict with this Court's holding in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) and with subsequent lower court decisions in *United States v. Washington*, 626 F.Supp. 1405 (W.D. Wash. 1985),

pertaining to the rights of tribes who move to reservations other than ones established in their respective treaties. Petition, pp. 5 - 7. The most casual examination reveals multiple flaws in this argument.

First, the decisions of the courts below in this case did not involve the loss of treaty rights caused by a treaty tribe's failure to move to the reservation established in its treaty. This is Colville's incorrect and misleading statement of the issue. See also, discussion in Statement of the Case in Yakima's Brief in Opposition. The decisions of the courts below in this case were based solely upon Colville's failure to establish treaty tribe status in accordance with the test it presented to the district court.

Second, the status of all tribal entities in *United States v. Washington* as treaty tribes has been finally decided. Nothing in the decisions below in this case is inconsistent with the analysis of successor in interest claims made in *United States v. Washington*, nor are the decisions below grounds for disrupting issues litigated and resolved years ago in *United States v. Washington*.

Third, while some of the tribes in *United States v. Washington* did go to reservations other than the one created in their respective treaties, that factual background is vastly different than the one in this case. *United States v. Washington* did not involve situations where, as here, a non-treaty tribe claims to be entitled to treaty rights of another tribe because some individuals from treaty tribes moved to the reservation of the non-treaty tribe and became members of the non-treaty tribe.

Finally, in contending that the decisions of the lower courts in this case conflict with rulings in *United States v.*

Washington, Colville is arguing that the Ninth Circuit is in conflict with itself. The Ninth Circuit heard the appeals from the district court in *United States v. Washington*, including the ones relied upon by Colville here. *See*, Petition, p. 6, citing 520 F.2d 676 (9th Cir. 1975).[4] The Ninth Circuit also heard Colville's appeal in this case and affirmed the district court's decision, Petition, Appendix A, p. 12a, which was premised almost exclusively upon Ninth Circuit precedent. Petition, Appendix C, pp. 30a - 39a. In addition, the Ninth Circuit considered and rejected Colville's petition for rehearing in this case and no judge of the court requested a vote on Colville's suggestion for rehearing en banc. Petition, Appendix D, pp. 66a - 67a.

Colville's assertion that the decisions in this case conflict with a previous decision of this Court is totally without substance. "The mere assertion of conflict with Supreme Court precedent will not suffice" for purposes of securing review upon a petition for a writ of certiorari. 13 Moore's Federal Practice § 810.45. "Rule 10 requires that the application of the precedent to the case at bar be clear." *Id.* The comparison of this case with *Passenger Fishing Vessel, supra*, demonstrates that the cases are factually distinct, are not inconsistent and that Colville has done nothing more than claim that a conflict exists. Colville's claim that the decisions below place portions of the decisions in *United States v. Washington* "in jeopardy," Petition, p. 7, is spurious and should be rejected.

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[4] Since the denial of certiorari in *U.S. v. Washington*, 641 F.2d 1368 (9th Cir. 1982), the Ninth Circuit has decided another case using the established case law of the circuit. *United States v. Suquamish Tribe*, 901 F.2d 772 (9th Cir. 1990).

C. Review of this decision will be of no instructive value to lower courts.

This case involves fishing rights held only by Indian Tribes who are parties to treaties negotiated by Isaac I. Stevens as Washington Territorial Governor. *See*, discussion of Stevens Treaty process in *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) and *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975). All tribes party to Stevens's treaties are located within the Ninth Circuit. As noted at footnote 4 above, the Ninth Circuit, over a period of nearly 20 years has developed a body of law dealing with this unique issue. No other circuit will have any occasion to deal with this question.

This Court has previously been asked to review the Ninth Circuit resolution of this area of the law and has declined to do so. *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1142, 1025 S.Ct. 1001, 71 L.Ed.2d 294 (1982). Colville makes no argument that discusses the previous denial of certiorari, even though Colville's present counsel was also counsel for Petitioner in that case. Colville makes no argument and presents no theory as to why this Court should change the position it took on this issue in 1982. The tribes herein submit there is no basis for a change in this position.

Further, and of equal importance, Colville does not challenge the law of the Ninth Circuit as to the test for determining treaty tribe status. Review by this Court of Colville's argument would do nothing to alter the established law of the Circuit, which this Court has already let stand in *United States v. Washington, Id.* Colville here, simply challenges the manner in which the Circuit

applied its own law in dealing with a factual determination by the trial court. Accordingly, there is absolutely no precedential or instructive value to be gained by a review of this case by this Court.

The rules and decisions of this Court have defined the grounds that will justify discretionary review by this Court. No such grounds are presented in Colville's petition here. Colville's petition should therefore be denied.

COLVILLE MISCHARACTERIZES AND MISREPRESENTS THE HOLDINGS OF THE COURTS BELOW

In its petition to this Court, Colville asserts that one of the questions "wrongly decided" by the Court of Appeals which requires review by this Court is:

> [w]hether Indian tribes which are signatories to a treaty with the United States lose their treaty-protected off-reservation fishing rights, *sub silentio*, by failing to move to the reservation created by the treaty.

Petition, p. 5.

This is not a position argued by any of the respondent tribes in either of the courts below nor is it a holding of either of those courts.[5] It is a fabrication by Colville for

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[5] The same is true of Colville's argument that the Court of Appeals failed to follow the rule that treaty rights, once vested, can be abrogated only by clear Congressional action. Petition, p. 7-9. This argument is true as it applies to tribal entities, however, it ignores the fact that individuals can become divested of treaty rights by other means such as abandoning their membership in a treaty tribe and by becoming a member in a non-treaty

purposes of this petition which invites this Court to make an erroneous factual assumption.

A. The Issue presented by Colville's Motion to Intervene was whether Colville was a successor in interest to rights under the Yakima and Nez Perce treaties and the District and Circuit Courts both ruled squarely on that issue.

In its petition, Colville seeks to have this Court examine an issue that was never before either of the lower courts. Colville states that issue as being "whether Indian tribes which are signatories to a treaty with the United States lose their treaty-protected off-reservation fishing rights, *sub silentio*, by failing to move to the reservation created by the treaty . . . " Petition, p. 5. Colville's Motion to Intervene in this case was premised upon a claim that Colville was a successor in interest to rights under the Yakima and Nez Perce treaties. "[C]olville filed a complaint in intervention seeking injunctive relief and a declaration that it is the successor in interest to the Wenatchi, Entiat, Chelan, Columbia, Palus and then Chief Joseph Band of Nez Perce Indians, and as such, it is entitled to exercise Columbia River off-reservation fishing rights

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tribe. Despite Colville's attempted definition, Petition p. 3 at note 2, its constituent entities that formed the basis for its claim in this case were not tribes and the District Court found accordingly. "[C]olville does seek to establish a direct link to the 1855 treaties by tracing members of identifiable groups within the Colville Reservation . . . to treaty signatories." Petition, Appendix C, p. 39a. *See also*, Petition, Appendix C, pp. 24a, 27a - 28a. Colville did not challenge this characterization in its appeal to the Ninth Circuit in this case.

reserved" in the Yakima and Nez Perce treaties. Petition, Appendix C, pp. 15a - 16a.

Judge Marsh was deliberately precise in defining the issue before him in the district Court. He first eliminated three distinct issues which he held were *not* before him. *Id.* at 31a. He then stated:

> I find that the issue before me is whether the Confederated Tribes of Colville Reservation may exercise authority, as a separate Treaty Tribe, to administer or regulate off-reservation treaty fishing rights based upon the fact that some of its members can trace their ancestry to parties to the Yakima or the Nez Perce Treaties of 1855.
>
> *Id.*

In order to resolve this issue, Judge Marsh concluded that he "must first consider who can hold treaty rights . . . " *Id.* He reviewed case law from this Court and the Ninth Circuit holding that treaty rights belong to tribes as opposed to individuals and that the regulation of treaty rights is an "internal affair" of the tribal entity, and then noted that the Ninth Circuit has held that any "tribe" which seeks to assert treaty fishing rights as a treaty signatory must first establish treaty tribe status. *Id.* at 32a. After an extensive review of the law and facts, Judge Marsh made a specific holding:

> Based on the foregoing, I find that the Colville Confederated Tribes has failed to establish that it is the successor Indian government and present day holder of treaty rights reserved (under Yakima and Nez Perce Treaties).
>
> *Id.* at 44a.

This finding was not premised upon the fact that a treaty tribe did not move to the reservation created by a treaty to which it was a party. Rather, the court came to this conclusion because Colville failed to meet its burden of proving the "unique" argument it urged before the district court.[6]

Similarly, the Ninth Circuit also focused upon the specific issue of whether Colville had established treaty tribe status:

> [T]he critical issue, however, is whether the (Colville constituent) tribes have shown that they have maintained political cohesion with the tribal entities created by the treaties and receiving fishing rights. For the reasons discussed below, we conclude that they have not. We therefore affirm.
>
> Petition, Appendix A, p. 8a.

The same fictitious issue presented by Colville to this Court was also urged upon the Ninth Circuit in Colville's Petition for Rehearing in this case. "The law of this Circuit is that treaty rights are not lost because a tribe does not move to and affiliate on the reservation in its treaty," Colville Petition for Rehearing, p. 4. Colville's Petition for

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[6] Colville attempted to combine elements derived from *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990) and *United States v. Washington*, 476 F.Supp. 1101 (W.D. Wash. 1979) and contended that the "constituent tribes" maintained distinct tribal structures within the Colville Confederacy and, at the same time, that they merged into that confederacy. The district court noted that "such an amalgam of arguments . . . becomes inconsistent with itself." Petition, Appendix C, p. 39a.

Rehearing was denied, Petition Appendix D, pp. 66a - 67a, and the Ninth Circuit issued a separate order amending its original opinion, in part, by the addition of the following language:

> Failure to move onto the reservation is not the determinative factor in deciding whether a group has maintained treaty rights. Rather, it is only one consideration relevant to an essentially factual inquiry - *i.e.*, whether a group claiming treaty rights has maintained sufficient political continuity with those who signed the treaty that it may fairly be called the same tribe. *See Washington II*, 641 F.2d at 1372-73.

Petition, Appendix B, pp. 13a - 14a.

Thus, the Ninth Circuit took extraordinary steps to make it very clear that its decision did not turn upon the failure of a tribe to move onto a reservation.

Both the district court and Ninth Circuit focused upon the determination of whether Colville had met its burden[7] of proving that it had achieved treaty tribe status. Both courts found that it had not. These courts have maintained and exercised continuing jurisdiction over *U.S. v. Oregon* and the treaty issues that have arisen within this case for more than 26 years. They made no error in deciding that Colville was not a successor in interest to the treaty rights of the Yakima and Nez Perce Tribes.

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[7] Petition, Appendix C, p. 34a.

B. Colville's issue statement invites this Court to make an erroneous factual assumption.

By asserting that an Indian Tribe does not lose its treaty-protected off-reservation fishing rights by failing to move to the reservation created by the treaty, Petition, p. 5, Colville implies that the facts of this case are consistent with that statement. They are not. Colville attempts to elevate its six constituent entities to treaty tribe status simply by defining them as treaty tribes. Petition, p. 3, 6. They are neither tribes nor parties to treaties. As the district court found, the groups that Colville claims as treaty tribes were not tribes but groups of individuals who can trace ancestry back to the Yakima and Nez Perce Tribes. "Colville does seek to establish a direct link to the 1855 treaties by tracing members of identifiable groups within the Colville Reservation . . . to treaty signatories." Petition, Appendix C, p. 39a.

The absence of tribal status is most obvious with regard to the Chief Joseph Band which, by its very title, was never a tribe, but one of sixteen or seventeen bands of the Nez Perce Tribe. Petition, Appendix C, p. 45a. Colville further perpetuates this distortion by portraying the Chief Joseph Band that went to the Colville Reservation as the same Chief Joseph Band that had representatives who signed the 1855 Nez Perce Treaty. Petition, p. 3. That is not true. The original Nez Perce Band known as the Wal?wama[8] Band had Old Chief Joseph as one of its leaders. Petition, Appendix C, p. 47a. After the Nez Perce

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[8] Phonetic spelling of original Nez Perce Band name. *See*, Petition, Appendix B, p. 47a.

War of 1877, that band as originally constituted, had ceased to exist. *W.W. Wolverton v. United States*, 29 Ct. Cl. 107 (1984). The group of survivors which included people from several bands and possibly from other tribes also came to be known as the Chief Joseph Band because Young Joseph, son of Old Joseph, had emerged as a spokesman for that group. Petition, Appendix C, pp. 53a - 55a.

Colville's contention that the Chief Joseph Band continues to exist at Colville is contrary to their own position in previous litigation. In *The Confederated Tribes of the Colville Reservation as Representative of the Joseph Band of the Nez Perce Tribe v. The United States*, 25 Indian Claims Commission 99, Docket No. 186 (1971), the primary claim urged by the Colville Tribe was for damages based upon the *"destruction of the Joseph Band as a viable economic, social and political entity." Id.* at 102 (emphasis supplied). It was ultimately ruled that this claim did not state a cause of action cognizable under the Indian Claims Commission Act, *Id.* at 105, but it reflects the common understanding that the original Joseph Band ceased to exist long ago.

While the situation regarding the Yakima Tribe is factually more complex than that of the Nez Perce, the district court found, on complex and disputed facts, that Colville had failed to establish that any of the alleged "Yakima groups" had gone to Colville as groups retaining Yakima Treaty rights. As Yakima correctly reflects in its brief in opposition, the court's decision on this issue is supported by substantial evidence, and the Ninth Circuit's opinion accurately reflects that the decision was based upon factual findings supported by the record in

accord with the long established law of the Circuit and this Court.

As the district court correctly found, the Yakima and Nez Perce Tribes are the parties to the treaties at issue here. "I find that the *tribal entities* which are reflected in the Yakima and Nez Perce treaties of 1855 are the present day Confederated Tribes and Bands of the Yakima Indian Nation and the Nez Perce Tribe of Idaho." Petition, Appendix C, p. 41a. From this, the Court concluded that the Nez Perce Tribe and Confederated Tribes and Bands of the Yakima Nation are the only duly recognized "tribal" organizations that may administer or regulate the exercise of fishing rights by treaty tribe members. *Id.*

Colville's characterization of issues in its petition is incorrect and misleading.

CONCLUSION

The district court, citing *United States v. Washington*, 641 F.2d 1368, 1371[9] (9th Cir. 1981), noted that the "sole purpose" of requiring proof of tribal status is to ensure that the group asserting treaty rights is the group named in the treaty. Petition, Appendix C, p. 32a. That purpose was met in this case. The Confederated Tribes and Bands of the Yakima Indian Reservation and the Nez Perce Tribe are the tribal entities named in the 1855 treaties and, as such, are the only tribes entitled to exercise rights reserved in those treaties.

[9] The citation here should be to page 1372.

Colville's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 94-1567

In The

Supreme Court of the United States

October Term, 1994

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Petitioner,

v.

THE YAKIMA INDIAN NATION, THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS RESERVATION OF OREGON, THE CONFEDERATED TRIBES OF THE UMATILLA RESERVATION, THE NEZ PERCE TRIBE OF IDAHO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

YAKIMA NATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an Indian tribe that is not a party to any treaty and which is a confederation of eleven different tribes, bands and groups, is entitled to exercise off-reservation fishing rights reserved by two other Indian tribes in treaties with the United States because some members of those treaty tribes became members of the non-treaty tribe?

2. Whether the Courts below properly concluded that the issue before them was not the same as the issues before the Court of Claims in *The Confederated Tribes of the Colville Reservation v. The Yakima Tribes of Indians*, 204 Ct. Cl. 868 (1974)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENTS AS TO WHY THE COURT SHOULD DENY CERTIORARI 4

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Bessemer City, 470 U.S. 564, 84 L.Ed.2d 518, 105 S. Ct. 1504 (1985) 6

Casillos v. U.S. Navy, 735 F.2d 338 (9th Cir. 1984) 6

Commissioners v. Sunnen, 33 U.S. 147, 92 L.Ed. 898 (1947) 10

Confederated Tribes of the Colville Reservation v. The Yakima Tribe of Indians of the Yakima Reservation, 204 Ct. Cl. 868 (1974) 1, 7, 8, 9

Montana v. United States, 440 U.S. 147, 59 L.Ed.2d 210 (1979) 11

Pullman-Standard v. Swint, 456 U.S. 273, 72 L.Ed.2d 66, 102 S. Ct. 1781 (1982) 6

Samish Tribe v. United States, 6 Ind. Cl. Comm. 159 (1958) 7

Sea Land Services v. Goudet, 414 U.S. 573, 39 L.Ed.2d 883 (1947) 10

Seufert v. U.S., 249 U.S. 194 (1918) 14

Snoqualamie Tribe v. United States, 372 F.2d 951 (Ct. Cl. 1967) 7, 8

Tulee v. Washington, 315 U.S. 682 (1942) 14

U.S. v. Suguamish Tribes, 901 F.2d 772 (9th Cir. 1990) 5

U.S. v. Washington, 384 F. Supp. 312 (E.D. Wash. 1974) 13

U.S. v. Washington, 520 F.2d 676 (9th Cir. 1975) 5, 14

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Washington, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143, 102 S. Ct. 1001, 71 L.Ed.2d 294 (1982) 4, 6, 8

U.S. v. Winans, 198 U.S. 371 (1905) 14

United States v. Oregon, 302 F. Supp. 899 (D.Or. 1968) 13

Washington v. Washington State Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979) 14

Whitefoot v. United States, 155 Ct. Cl. 127, 293 F.2d 658 (1961) 11

STATEMENT OF THE CASE

The Yakima Nation adopts the statement of the case as set forth in the joint Nez Perce and Warm Springs opposition to Colville's Petition as to the general factual background of the *U.S. v. Oregon* case, and the historical background of this case. Yakima also adopts the arguments made therein as though fully set forth here.

It is necessary, however, to reiterate that Colville, beginning with the untitled statement found at pages 1 and 2 of Its Petition, and continuing throughout Its statement of the case and argument, mischaracterizes both the factual basis for its claim and the holdings of the Courts below and the Court of Claims case (*Confederated Tribes of the Colville Reservation v. The Yakima Tribe of Indians of the Yakima Reservation*, 204 Ct. Cl. 868 (1974)) upon which It relies for Its estoppel claim. Those mischaracterizations are as follows:

(1) The issue in this case was whether any groups of Indians on the Colville Reservation had retained "Treaty Tribes status" at the time of the Colville Confederation. Both the District Court and the Ninth Circuit held, as a factual matter, that Colville had failed in its burden of proof on this issue. Colville's continued reference to "Treaty Tribes" on its Reservation as though that fact had been established in Colville's favor, is incorrect and unfairly mischaracterizes the posture of this case;

(2) As is discussed *infra* in the argument section, the issue before the Court of Claims in *Colville v. Yakima*, 204 Ct. Cl. 868 (1974) was the division of claims funds for a *divestiture of aboriginal land claims through a treaty land*

cession, not a determination of the retention of prospective Treaty rights. The District Court, the Ninth Circuit, and the Court of Claims all recognized that the Claims Court decision did not deal with the issue of Treaty right status in any manner. Again, Colville's statements that the Court of Claims in any way ruled on Colville's "Treaty right status" is an unfair and incorrect statement of both the Claims Court ruling and the holdings of the Courts below.

Also, the District Court action regarding Yakima is somewhat different from that involving Nez Perce. Colville and Nez Perce submitted agreed facts and no other evidence. Yakima and Colville, on the other hand, submitted some agreed facts, but also presented the written testimony (over 200 pages) of four expert witnesses and the testimony of eight lay witnesses. The evidence was in dispute and the District Court made findings of fact on that disputed evidence. Colville's inclusion of Appendix 2, as "Yakima agreed facts", should not confuse the Court that those were the only facts before the Court. Based upon the evidence before it, the District Court, as to both the Yakima and Nez Perce claims, determined that Colville had failed in its burden of proof as to "Treaty Tribe status".

The Court should also note that the executive order creating the Colville Reservation, Colville Appendix G, P. 86a, created a reservation for Indians "not parties to any treaties". Similarly, the 1883 executive order under which "Moses and his people" (the group from whom Colville claims Yakima Treaty rights), makes no reference to a treaty and provided only that:

> The Government will secure to Chief Moses and his people, as well as to all other Indians who may go on to the Colville Reservation, and engage in farming, *equal rights and protection alike with all other Indians now on the Colville Reservation,* and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people.
>
> Appendix C hereto, P. 23.

Finally, as is further discussed *infra*, contrary to Colville's assertion, both the District Court and the Ninth Circuit properly dealt with Colville's claim of estoppel as to their alleged "Treaty Tribe status". Colville moved for summary judgment on this issue, filing a 30 page brief, including 38 exhibits. The District Court heard oral argument and ruled on Colville's motion:

> As to the issue of whether the five aboriginal tribes moved to the Colville Reservation and whether the Colville presently represent these tribes in all tribal or group matters, *I find that the combined findings of the ICC and Court of Claims as to the movement of significant numbers of the tribal members to the Colville Reservation, the "group nature" of the damage claim and the Colville's status as the current "tribal representative" of the tribes for the purpose of allocating the damage award do not support the Colville's contention that the claims decisions found that the Chelan, Wenatchi, Entiat, Columbia and Palus tribes moved as tribes onto the Colville Reservation and are currently represented in all tribal matters by the Colville. Thus, the doctrine of collateral estoppel does not preclude litigation of*

this matter.[1] District Court opinion pages 11 and 12, opinion and order contained herein as Appendix 1.

The Circuit affirmed this decision by finding that Judge Marsh made a proper *factual* determination in deciding that Colville had failed in Its proof of "Treaty Tribe status" at the time that Moses and his people moved to Colville. Obviously the Ninth Circuit Court of Appeals, in upholding Judge Marsh's opinion, understood the thrust of its precedents in this area of the law.

ARGUMENTS AS TO WHY THE COURT SHOULD DENY CERTIORARI

1. This case is of no nationwide importance, no significant precedential value nor will it provide instruction to the lower Courts.

Yakima adopts the arguments on these issues made in the joint reply brief in opposition filed by the Nez Perce and Warm Springs Tribes.

2. This Court has previously denied certiorari on the Ninth Circuit's law on the issue in this case.

As the Nez Perce and Warm Springs indicate in their Petition, this Court has previously denied certiorari in a case dealing with this issue. *U.S. v. Washington,* 641 F.2d

[1] The District Court did determine, based on the Claims Court findings and conclusions, that several factual issues had been decided and precluded the parties from relitigating these issues. Order on Summary Judgment Appendix A hereto P. 13.

1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143, 102 S. Ct. 1001, 71 L.Ed.2d 294 (1982). Colville presents no theory or compelling reason why, after thirteen (13) years of additional development of Ninth Circuit law on this issue – see *U.S. v. Suguamish Tribes*, 901 F.2d 772 (9th Cir. 1990) – this Court should change its policy. Yakima submits that there is no basis for a change, and this petition should be denied.

3. The District Court's ruling was a factual determination supported by substantial evidence and was properly upheld by the Ninth Circuit.

As the District Court's opinion on summary judgment (Appendix A hereto) reflects, the issue of whether any of the descendants of Yakima and Nez Perce Treaty Tribes moved to the Colville Reservation *as Tribes*, retaining any Treaty rights, are questions of fact. (Appendix A P. 12) The clearly established law of the Circuit on this issue is found in *U.S. v. Washington*, 520 F.2d 676 (9th Cir. 1975):

> Reviewing Judge Boldt's initial decision, we indicated that treaty-tribe status is established when "a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure." 520 F.2d at 693. ***Whether these conditions are met is a factual question which a district court is competent to determine*** at 693 Emphasis added.

Judge Marsh determined, as a factual matter, that under the established law of the Circuit, Colville had failed to meet its burden to qualify for Tribal identity.

That decision could only be upset on review if it was clearly erroneous:

> *"The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the [Title VII] plaintiff." . . . We will reverse that factual determination only if it is clearly erroneous . . . and we will not ransack the record, searching for mistakes. Casillos v. U.S. Navy,* 735 F.2d 338, 342 (9th Cir. 1984)

Of course, the Circuit's rule on factual findings is in accord with Federal Rule 52(a) and the decisions of this Court. *Anderson v. Bessemer City,* 470 U.S. 564, 84 L.Ed.2d 518, 105 S. Ct. 1504 (1985); *Pullman-Standard v. Swint,* 456 U.S. 273, 72 L.Ed.2d 66, 102 S. Ct. 1781 (1982).

The Circuit's amended opinion, found in Colville Appendix A, at page 14a, indicates Its treatment of this case as a review of the Trial Court's factual findings:

> Failure to move onto the reservation is not the determinative factor in deciding whether a group has retained treaty rights. *Rather, it is only one consideration relevant to an essentially factual inquiry* – i.e., whether a group claiming treaty rights has maintained sufficient political continuity with those who signed the treaty that it may fairly be called the same tribe. See *Washington II,* 641 F.2d at 1372-73. (Emphasis added)

The Circuit considered Judge Marsh's findings, found sufficient support for them to pass the clearly erroneous test, and affirmed his decision. See discussion of Judge Marsh's factual determinations at page 10a of Colville's Appendix A. Further review will serve no purpose.

4. The decision of the Court of Claims in *The Confederated Tribes of the Colville Reservation v. The Yakima Tribes of Indians of the Yakima Reservation*, 204 Ct. Cl. 868 (1974) created no grounds for estoppel as to the ultimate issue in this case.

A. The established law of the Ninth Circuit, in a case in which this Court has already denied certiorari, is contrary to Colville's claims of estoppel.

As noted previously, this Court denied certiorari in the case of *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1988), *cert. denied*, 454 U.S. 1143, 102 S. Ct. 1001, 71 L.Ed.2d 294 (1982). The issue there was the test for "Treaty Tribes recognition" for exercise of fishing rights under a Stevens Treaty. The Snoqualmie Tribe, which had previously presented a successful Court of Claims action for the loss of its aboriginal lands, asserted that that ruling established its "Tribal status" for Treaty fishing rights purposes.

In spite of a specific finding by the Court of Claims that the Snoqualmie was a "fishing and hunting" tribe for purposes of that claim, the Ninth Circuit refused to find that ruling estopped the United States in a subsequent action to establish tribal treaty fishing rights:

> The appellants contend that the court was bound by decisions of the Indian Claims Commission and the Court of Claims in which the appellants were allowed to pursue claims on behalf of members. *Snoqualmie Tribe v. United States*, 372 F.2d 951, 957-58 (Ct. Cl. 1967); *Samish Tribe v. United States*, 6 Ind. Cl. Comm. 159 (1958).

> **These claims, however, involved compensation for individuals, not fishing rights for tribal units. The causes of action and factual issues litigated were different, and the doctrines of res judicata and collateral estoppel are therefore inapplicable.** 1B Moore's Federal Practice 0.405[1], [3]. (emphasis added) *United States v. Washington,* 641 F.2d at 1374.

The claims cases discussed herein are identical to those brought by *Snoqualmie.* They were claims for damages for underpayment for the cession of lands under a Stevens Treaty. Counsel for those petitioners is also counsel for Colville in this case.

Colville now asks the Court to grant certiorari on precisely the same issue which this Court chose to deny certiorari in 1982. The holding in *U.S. v. Washington, supra,* is the established law of the Circuit, and it was followed by both Courts below. This Court should not now change the decision it made in the denial of certiorari in 1982.

B. The holdings in *Confederated Tribes of the Colville Reservation v. The Yakima Tribe of Indians of the Yakima Reservation,* 204 Ct. Cl. 868 (1974), and the Indian Claims Commission before it, are specifically limited by their language to the issue of division of the Judgment owed, and not the rights of Colville under the Yakima Treaty.

Colville, throughout this case, mistakenly alleges the claims cases established its "status" with regard to the Yakima Treaty and determined its "rights" under the Yakima Treaty. (Colville Petition, pages 11-12) That did not happen. The only issue before those Courts were the division of the Indian Claims Commission Docket 161 monetary award, not any continuing "rights" under the

Yakima Treaty or the "status" of Colville as a "treaty" tribe. The initial trial in Indian Claims Commission Docket 161 was for the purpose of determining:

> (1) whether the petitioners, or any of them, have authority, under the Indian Claims Commission Act, to present claims for the taking of the area described in paragraph 8 of the petition in Docket No. 244, as amended;
>
> (2) whether the petitioners, or any of them, held Indian title to the said area, or any part thereof;
>
> (3) the date of the taking, if any, of the said area, or any part thereof by the defendants.
>
> 7 Indian Claims Commission 794, 795.

Following that hearing, the Indian Claims Commission in Docket 161, determined that both the Yakima and Colville were entitled to share in some portion of the funds found to be owing. Thereafter, Court of Claims Commissioner Harkins, whose opinion was adopted as the opinion of the Court of Claims, in 204 Ct. Cl. 868, at 869, specifically found that:

> **Validity of the Yakima Treaty is not an issue in this case, and the legal consequences of the treaty are irrelevant to the division of the monetary award . . .**
>
> **The Yakima Treaty provides a conduit for extinguishment of the Indian title rights of the 11 tribes** and it created an entity to accept compensation for the taking of the aboriginal lands. **Interpretation of the scope and content of its various provisions are not the subject of this case. In the past, application of the treaty provisions to particular questions have arisen and**

> **have been resolved. In the future, interpretation of the treaty provisions may *be determined in the context of the factual circumstances that apply when such issues arise*.** (footnotes omitted) (emphasis added)

Report of Claims Court Commissioner Harkins. Pages 7 and 8 included here as Appendix B.

The holdings upon which Colville relies to establish its "rights" and "status" through collateral estoppel, are specifically limited by their terms to the division of the monetary award for lands taken by the United States pursuant to the Yakima Treaty.

The Court of Claims further specifically noted that future controversies involving the Yakima Nation and the "scope and content" of the Treaty must be resolved in the factual contexts in which they arise. It could not be more clear that the Court of Claims limited its decision to the monetary award. It did not deal with the issues Judge Marsh found to be preserved for trial – the issue of retention of Treaty rights. Marsh Summary Judgment Opinion Appendix A P. 12.

Colville, at trial, before the Ninth Circuit and now before this Court, simply insists that the Court of Claims' decision determined all issues as to its alleged Treaty status. The Court not only did not make such a decision, it specifically rejected any suggestions that it do so, leaving such decisions to later decisions. Without proof that an issue identical to this one was before the Claims Court and actually decided, Colville's estoppel argument must fail. *Sea Land Services v. Goudet*, 414 U.S. 573, 39 L.Ed.2d 883 (1974); *Commissioners v. Sunnen*, 33 U.S. 591, 601, 92

L.Ed. 898 (1947); *Montana v. United States*, 440 U.S. 147, 153, 59 L.Ed.2d 210 (1979).

Judge Marsh properly found, and the Circuit confirmed, that the issue of treaty rights for fishing purposes was not one decided by the Claims Court, and was, therefore, a proper basis for a trial on the factual issues. This decision is correct. There is nothing novel or compelling about it which warrants review by this Court.

C. The Claims Court specifically determined that the Yakima Tribe was the holder of Treaty rights under the Treaty with the Yakimas.

Colville asserts that the Court of Claims found that Yakima "did not exist", apparently contending that Yakima Treaty rights are somewhere in limbo. This again is incorrect. The Claims Court, in previous cases, cited with approval by Commissioner Harkins in his opinion (Appendix B, P. 19, footnote 3), specifically held the Yakima Tribe was the owner of the Yakima Treaty fishing right.

In *Whitefoot v. United States*, 155 Ct. Cl. 127, 293 F.2d 658 (1961), cited by Commissioner Harkins at footnote 3, the Court of Claims determined that the fishing rights secured under the Yakima Treaty of 1855 were held by the Confederated Tribes and Bands of the Yakima Indian Nation rather than by Mr. Ambrose Whitefoot, a member of the Yakima Indian Nation who was claiming rights through membership in one of its aboriginal bands. Accordingly the Court held that Mr. Whitefoot had no individual claim against the United States:

> While property is vested in a tribe, it is the individual member who enjoys the use of the property. Federal Indian Law, supra, 757. As to fishing, this is true. **But, like the lands, the interests in the fisheries are communal, subject to regulations.**
>
> [1.2] **We hold that the use of accustomed fishing places whether on or off the reservation, is a tribal right for adjustment** by the Tribe and that the fact that certain Indians have been allowed to have sole use of a particular spot by the Tribe gives that individual no property right against the Tribe and does not limit the Tribe's right to collect the damages for obliteration of fishing spots by the dam. We hold further that Minnie Whitefoot has no claim against the United States. (emphasis added) at 663.

Obviously the Court of Claims recognized that the Yakima Nation held the fishing rights reserved under the Treaty of 1855. Colville's assertions to the contrary are unsupported by the cases they cite. Nothing in their argument warrants review by this Court.

D. The law is clearly established as the law of this case, the Ninth Circuit, and this Court that the current Yakima Nation is the Treaty Tribe holding off reservation fishing rights under the Treaty of 1855.

As Yakima argued before both the Trial and Appellate Courts, it is not Its status which is at question here. Instead it is whether Colville has any basis to also exercise rights under the Yakima Treaty. The status of Yakima is irrelevant. However, Colville continues to troll that red

herring in hopes of a bite. Yakima believes a brief description of its Federally recognized rights will be of assistance to the Court.

The District Court in this case, in 1968, found that the Yakima Nation was the proper party to regulate fishing rights under the Yakima Treaty. Judge Belloni's original ruling, not appealed by any party, reflects the Court's decision on the proper treaty parties:

> Shortly thereafter the *United States on its own behalf and on behalf of the Confederated Tribes and Bands of the Yakima Reservation, the Confederated Tribes and Bands of the Umatilla Reservation composed of the Walla Walla, Cayuse and Umatilla Bands of Tribes, the Nez Perce Indian Tribe and "all other tribes similarly situated" filed Case No. 68-513* . . . Following the intervention of the Warm Springs Tribe and *upon the inability of government counsel to identify any other tribes who were "similarly situated", the State's motion to strike the reference to such other tribes was granted.* (emphasis added.)

United States v. Oregon, 302 F. Supp. 899, 904 (D.Or. 1968).

The District Court recognized that it had *all parties* to these rights before it when it stated:

> *Today, some 114 years later, all of the parties to those treaties are in essential agreement as to their meaning* and they have joined in asking this Court to confirm that construction (*Id.* at 905).

Likewise Judge Boldt, in *U.S. v. Washington*, 384 F. Supp. 312 (E.D. Wash. 1974) at page 406 held:

> Each of the plaintiff tribes listed below is a "Treaty Tribe".

> A Treaty Tribe occupies the status of a party to one or more of the Stevens' treaties and therefore holds for the benefit of its members a reserved right to harvest anadromous fish at all usual and accustomed places outside reservation boundaries, in common with others:
>
> Confederated Tribes and Bands of the Yakima Indian Nation.[2]

This decision was affirmed by the Ninth Circuit in *U.S. v. Washington*, 520 F.2d 676 (9th Cir. 1975), and affirmed by the Supreme Court in *Washington v. Washington State Passenger Fishing Vessel Assn.*, 443 U.S. 658, 61 L.Ed.2d 823, 99 S. Ct. 3055 (1979). See also *U.S. v. Winans*, 198 U.S. 371 (1905), *Seufert v. U.S.*, 249 U.S. 194 (1918) and *Tulee v. Washington*, 315 U.S. 682 (1942).

Yakima's rights are the law of this case and the law of this land. Colville's contrary arguments are simply incorrect.

CONCLUSION

Colville petitions for certiorari asserting the precedential importance of this case, claiming a conflict exists between this case and *Washington v. Washington State Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979). As this

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[2] Judge Boldt also made the following finding, at P. 380:
The Yakima Nation is a party to treaty with the Yakimas. [Ex. Y-6] *It is recognized by the United States as a currently functioning Indian tribe composed of the tribes and bands consolidated into the Yakima Nation by that treaty and maintaining a tribal government on the Yakima Reservation*, located in South Central Washington. (emphasis added)

brief is in opposition and the brief in opposition filed by the Nez Perce and Warm Springs Tribes reflect, there is no national or precedential value to this case, and no conflict exists with any decision of this Court. Both courts below dealt properly with the issues before them. Accordingly this Court should deny the Colville Petition.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF OREGON, et al., Defendants, and CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Plaintiff-Intervenor.	Civ. No. 68-513-MA OPINION (Filed Feb. 25, 1991)

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MARSH, Judge.

Plaintiff-intervenor Confederated Tribes of the Colville Reservations ("Colville") move for partial summary seeking a ruling from this court that all parties to this action are collaterally estopped from relitigating issues which were litigated and resolved in proceedings before the Indian Claims Commission ("ICC"), reported at 7 Ind. Cl. Comm. 794 (1959), 12 Ind. Cl. Comm. 301 (1963) and 15 Ind. Cl. Comm. 196 (1965), and before the Court of Claims in *The Confederated Tribes of the Colville Reservation v. The Yakima Tribes of the Yakima Reservation*, (Docket 261-70), 204 Ct. Cl. 868 (April 24, 1974) (collectively referred to as the "claims decisions"). The Colville contend that these decisions determined both the Colville's relationship to the Chelan, Wenatchi, Entiat, Columbia and Palus tribes, aboriginal tribes who were party to the Yakima Treaty of June 9, 1855, 12 Stat. 951, and the nature and purpose of the "Yakima Nation" described in the preamble to this Treaty. The Colville claim that the doctrine of collateral estoppel properly applies to these judicial determinations because although this case involves fishing rights under the 1855 Treaty and the claims decisions involved the right to be paid fair compensation for lands taken under the Treaty, both cases involve the same Treaty and the same background issues as to the movement of the signatory tribes and the meaning of "Yakima Nation" in the Treaty. The Colville do not contend that the claims decisions determined whether the Colville have treaty fishing rights as a successor-in-interest to the five aboriginal tribes but rather argue that the application of collateral estoppel to background matters is important to the resolution of the fishing rights issue because it will

substantially simplify the trial on this matter. For the reasons set forth below, the Colville's motion is granted in part and denied in part.

STANDARDS

Summary judgment is appropriate if the court finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There is no genuine issue of material fact where the nonmoving party fails "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotext Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1983); *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

All reasonable doubts as to the existence of genuine issues of fact must be resolved against the moving party. *Hector v. Wiens*, 533 F. 2d 429, 432 (9th Cir. 1976). The inferences drawn from underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valadingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences can be drawn, summary judgment is inappropriate. *Sankovitch v. Insurance Co. of N. Am.*, 638 F.2d 136, 140 (9th Cir. 1981).

DISCUSSION

The doctrine of collateral estoppel precludes the relitigation of an issue of fact or right once decided by a court of competent jurisdiction. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Deutsch v. Flannery*, 823 F.2d 1361, 1364 (9th Cir. 1987). Under this doctrine, once an issue is

actually and necessarily determined "that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana*, 440 U.S. at 153. Collateral estoppel is used "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana*, 440 U.S. at 153. In order for collateral estoppel to apply, it must be shown that the issue was (1) actually litigated between the parties in a former proceeding and (2) necessary to both proceedings. *Starker v. United States*, 602 F.2d 1341, 1344 (9th Cir. 1979). In determining whether the issue was actually litigated between the parties in the former proceeding, the Supreme Court has set forth the following three part test:

> first, whether the issues presented by [the present] litigation are in substance the same as those resolved . . . [in the prior litigation] . . . , second, whether controlling facts or legal principles have changed significantly since the [prior judgment]; and finally, whether other special circumstances warrant an exception of the normal rules of preclusion.

Montana, 440 U.S. at 155. Collateral estoppel applies to the decisions of administrative tribunals as well as courts, *Huettig & Schrom, Inc. v. Landscape Contractors Council*, 790 F.2d 1421, 1426 (9th Cir. 1986), and has been applied to bar the relitigation of issues previously decided in ICC and Court of Claims proceedings, *Yankton Sioux Tribe v. Nelson*, 604 F.Supp. 1146 (D.S.D. 1985), *rev'd on other grounds*, 796 F.2d 241 (8th Cir. 1986). Collateral estoppel has been applied in litigation involving Indian tribes on issues of tribal identity, *Mashpee Tribe v. Watt*, 707 F.2d 23, 24 (1st Cir.), *cert. denied*, 464 U.S. 1020 (1983), water

rights, *Arizona v. California*, 460 U.S. 605, 616 (1983), and wrongful termination matters, *Duncan v. United States*, 667 F.2d 36, 38 (Ct. Cl. 1981), *cert. denied*, 463 U.S. 1228 (1983).

The background to and actual holding of the ICC and Court of Claims' decisions allocating the damage award between the Colville and Yakima Tribes is largely undisputed. In 1948, the Yakima Tribe filed a petition before the ICC claiming that it had not been paid fair compensation for lands ceded under the Treaty of 1855. In that petition, the Yakima Tribe claimed that it was the representative of and successor to each of the tribes which had been party to the 1855 Treaty and was therefore entitled to a damage award on their behalf. The Colville Tribes also filed petitions before the ICC claiming that it represented the interests of the Chelan, Wenatchi, Entiat, Columbia and Palus tribes and that the Colville, not the Yakima, were therefore entitled to the damage award for undercompensated lands on behalf of these tribes.

In determining how the damage award should be allocated, the ICC found that the Chelan, Wenatchi, Entiat, Columbia and Palus tribes were parties to the Treaty of 1855, 7 Ind. Cl. Comm. at 800-01, and that the Colville represented their interests for the purpose of allocating a monetary damage award. In so doing, the ICC made the following determinations: (1) the Yakima Tribe was "not synonymous with nor the successor to the Yakima Nation which was created in 1855 and was . . . wronged by the treaty of 1855," (2) the "Yakima Nation which was created in 1855 does not exist as an entity today," (3) "a significant number of Indians who were members of various of the fourteen tribes or groups

comprising the Yakima Nation became located on the Colville Reservation. Indians from the Chelan, Entiat, Wenatchi, Columbia and Palus tribes in particular became located in large numbers on the Colville Reservation," 12 Ind. Cl. Comm. at 368, and (4) "[t]here was no movement as a tribe by either the Chelan, Entiat, Wenatchi or Columbia on to the Yakima reservation although individual members of each of the four tribes did move to that reservation." 7 Ind. Cl. Comm. at 802. While the ICC found that "Chief Moses and his followers did, in fact, move onto the Colville Reservation and the members of his band or the descendants thereof have continued to reside on that reservation until the present date," 7 Ind. Cl. Comm at 811, *accord* 12 Ind. Cl. Comm. at 368, it did not specifically find that the Chelan, Wenatchi, Entiat, Columbia, and Palus tribes moved to the Colville Reservation as tribes. The Court of Claims did, however, find that:

> Combining the trial judge's findings . . . with the Commission's findings[1] . . . we conclude that

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[1] On this issue, the Commissioner found that "[i]n this case, the tribal entities can be traced to plaintiff Colville Tribes and to defendant Yakima Tribes." The Commissioner therefore concluded that "justice and fairness require the judgment funds to be divided on the basis of acreage contributed by the respective tribes that were confederated into the Yakima Nation. Such a division accords with the concept that compensation for taking tribal land is a tribal claim and not an individual claim." Addressing this issue, the Commissioner concluded that "[d]efendant [Yakima tribe] represents the interest of the Kittitas, Wanapam, Yakima, Klikitat, Wishram, and Skeen Tribes" and that "[p]laintiff [Colville Tribe] represents the interests of the Chelan, Entiat, Wenatchi, Columbia and Palus Tribes."

> it is clear that plaintiff [Colville Tribes], not defendant [Yakima Tribe], represents the interests of those particular groups [the Chelan, Wenatchi, Entiat, Columbia and Palus tribes]. Although defendant may have some members who are descendants of the same original groups, the claim is a group claim and the present tribal representative, if there is one, normally obtains the award . . . Justice and fairness do not require us to disregard the group nature of the claim, and the status of plaintiff as the current tribal representative of the five named groups, so as to increase defendant's award because its membership happens to include a number of descendants of Indians who belonged to the groups now represented by the plaintiff.

204 Ct. Cl. at 870.

Based on the findings by the ICC and the Court of Claims, the total damage award for undercompensated lands was allocated between the Colville and Yakima Tribes with the Colville Tribes receiving all of the award attributable to lands owned by the Chelan, Wenatchi, Entiat, Columbia and Palus tribes. The Court of Claims so awarded the damages based on its finding that the damage claim was of a "group nature" and that the Colville tribe was "the current tribal representative of the five named groups." 204 Ct. Cl. at 870.

Reports of the Commissioner to the Court, Docket No. 261-70 (July 27, 1973).

The Colville argue that the allocation of the damage award on behalf of the Chelan, Wenatchi, Entiat, Columbia and Palus tribes to the Colville based on the "group nature" of the claim constitutes a finding that the Chelan, Wenatchi, Entiat, Columbia and Palus tribes moved to the Colville Reservation as tribes and are now represented by the Colville. As explained below, I disagree with this conclusion.

The Yakima oppose Colville's motion for partial summary judgment and emphasize the numerous issues which must be addressed and resolved by this court before the Colville can be found to be entitled to fishing rights under the 1855 Treaty. In particular, the Yakima argue that in order to show entitlement to treaty fishing rights the Chelan, Wenatchi, Entiat, Columbia and Palus tribes must prove (1) that these tribes moved as tribes to the Colville Reservation, (2) that they have enjoyed a continuous cultural and political existence once relocated on the Colville Reservation and have not been assimilated by other non-treaty groups, *United States v. Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982), and (3) with respect to the entitlement of the Confederated Tribes of the Colville Reservation themselves, that they have acquired "treaty tribe status" through their consolidation or merger with treaty tribes and the maintenance of an organized tribal structure, *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th Cir. 1990). The Yakima contend that the claims decisions did not determine these essential matters because the claims decisions dealt only with the compensation of tribal descendants for the extinguishment of aboriginal

land claims by the Treaty of 1855 and not with the establishment or continuation of any aboriginal claims or rights under the treaty.[2]

The United States, Oregon, Washington and Idaho, and the Umatilla, Nez Perce and Warm Springs Tribes have all agreed that while not technically estopped by the claims decisions because they were not parties to that litigation, they will not seek to relitigate at the trial on the Colville's treaty fishing rights purely factual matters raised in the Colville's motion for partial summary judgment. The parties reserve their right, however, to raise questions of law and questions of mixed law and fact concerning the legal significance of the claims decisions' factual determinations.

With the exception of the issue of whether the aboriginal tribes moved as tribes onto the Colville Reservation, I find that the issues raised by the Yakima in opposition to the Colville's motion for partial summary judgment are not matters on which the Colville are moving for summary judgment. While these unresolved matters as to the assimilation, consolidation and/or merger of the aboriginal tribes with other tribes located on the Colville Reservation must ultimately be resolved in order to determine

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[2] In their memorandum in opposition to the Colville's motion for partial summary judgment, the Yakima go even farther and argue that in another claims decision, the "ICC found that the 'Colville Tribe' had no treaty reserved fishing rights that are the subject matter of *United States v. Oregon*, 302 F.Supp. 899." I disagree with this interpretation of the ICC's decision. The ICC merely recognized that "the existence of special fishing rights is a question of fact" which was not before the Commission. 36 Ind. Cl. Comm. 183, 193-94 (1975).

prospective fishing rights, the Colville do not seek to have the doctrine of collateral estoppel applied to these matters. Accordingly, collateral estoppel does not apply.

As to the issue of whether the five aboriginal tribes moved to the Colville Reservation and whether the Colville presently represent these tribes in all tribal or group matters, I find that the combined findings of the ICC and Court of Claims as to the movement of significant numbers of the tribal members to the Colville Reservation, the "group nature" of the damage claim and the Colville's status as the current "tribal representative" of the tribes for the purpose of allocating the damage award do not support the Colville's contention that the claims decisions found that the Chelan, Wenatchi, Entiat, Columbia and Palus tribes moved as tribes onto the Colville Reservation and are currently represented in all tribal matters by the Colville. Thus, the doctrine of collateral estoppel does not preclude litigation of this matter.

With respect to the remaining issues presented in the Colville's motion for partial summary judgment, I find that these issues are "in substance the same" as those resolved in the claims decisions, that the controlling facts and legal principles have not changed significantly since the claims decisions were rendered and that no special circumstances warrant an exception to the normal rule of preclusion. *Montana*, 440 U.S. at 155. Accordingly, collateral estoppel applies to the remaining issues.

CONCLUSION

For the reasons set forth above, the Colville's motion for partial summary judgment is granted in part and

denied in part. The Yakima Tribe are hereby collaterally estopped from relitigating the following determinations made by the ICC and Court of Claims: (1) the Chelan, Wenatchi, Entiat, Columbia and Palus Tribes were each party to the Yakima Treaty of June 9, 1855 which was entered into at Walla Walla, Washington territory; (2) the "Yakima Nation" which was created by and named in the preamble to the Treaty of 1855 is not synonymous with the Yakima Tribe and does not exist as an entity today; (3) the Chelan, Wenatchi, Entiat, Columbia and Palus Tribes and the Kittitas, Wanapam, Yakima, Klikitat, Wishram, and Skeen Tribes are successors to the "Yakima Nation" identified in the preamble to the 1855 Treaty; (4) there was no movement as a tribe by either the Chelan, Wenatchi, Entiat, Columbia or Palus tribes onto the Yakima Reservation although individual members of the tribes did move to that reservation; (5) a significant number of Indians who were members of the Chelan, Wenatchi, Entiat, Columbia and Palus tribes moved onto the Colville Reservation; and (6) the Colville Tribes represent the tribal interests of the Chelan, Columbia, Wenatchi, Entiat and Palus Tribes for the purpose of allocating the monetary damage award for undercompensated lands under the Treaty of 1855. The other parties to this action are precluded from relitigating these factual determinations based on their consent to preclusion.

DATED this 25 day of February, 1991.

/s/ Malcolm F Marsh
Malcolm F. Marsh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF OREGON, et al., Defendants, and CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Plaintiff-Intervenor.	Civ. No. 68-513-MA ORDER (Filed Feb. 25, 1991)

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For the reasons set forth in my opinion filed this date, the Colville's motion for partial summary judgment is granted in part and denied in part. The Yakima Tribe are

hereby collaterally estopped from relitigating the following determinations made by the ICC and Court of Claims: (1) the Chelan, Wenatchi, Entiat, Columbia and Palus Tribes were each party to the Yakima Treaty of June 9, 1855 which was entered into at Walla Walla, Washington Territory; (2) the "Yakima Nation" which was created by and named in the preamble to the Treaty of 1855 is not synonymous with the Yakima Tribe and does not exist as an entity today; (3) the Chelan, Wenatchi, Entiat, Columbia and Palus Tribes and the Kittitas, Wanapam, Yakima, Klikitat, Wishram, and Skeen Tribes are successors to the "Yakima Nation" identified in the preamble to the 1855 Treaty; (4) there was no movement as a tribe by either the Chelan, Wenatchi, Entiat, Columbia or Palus tribes onto the Yakima Reservation although individual members of the tribes did move to that reservation; (5) a significant number of Indians who were members of the Chelan, Wenatchi, Entiat, Columbia and Palus tribes moved onto the Colville Reservation; and (6) the Colville Tribes represent the tribal interests of the Chelan, Columbia, Wenatchi, Entiat and Palus Tribes for the purpose of allocating the monetary damage award for undercompensated lands under the Treaty of 1855. The other parties to this action are precluded from relitigating these factual determinations based on their consent to preclusion.

IT IS SO ORDERED.

DATED this 25 day of February, 1991.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

APPENDIX B

. . . . Its purpose was to satisfy the requirements of the territorial acts[8] that prohibited any impairment of the rights of Indians to lands in the territories so long as such rights remained unextinguished by treaties with the United States.

At the Walla Walla Council, the Indians were to be persuaded to agree to cede their tribal territories in exchange for guaranteed use of specified reserved areas, and for certain additional considerations. The policy adopted by [6] the Indian Bureau, and implemented by Governor Stevens and General Palmer, was to deal only with recognized leaders who had great authority among the Indians. Through recognition and appointment of "head chiefs," the numerous groups of tribes or bands were to be united into larger units which would be concentrated on a few reservations.

The Walla Walla Council was protracted and negotiations to obtain agreement with the Indians were difficult. In anticipation of possible hostility, and to assure a successful conclusion, Governor Stevens had arranged for military troops to be present. Some of the tribal leaders were absent, and others refused to participate in council discussions. The chief that Governor Stevens had designated to be head chief of the Yakimas, Chief Kamiakin, on June 8, 1855, prepared to leave the council without signing. In a series of closed meetings, during which extraordinary pressures were applied, including the threat of

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[8] Act of August 14, 1848, 9 Stat. 323; Act of March 2, 1853, 10 Stat. 172.

military action, Governor Stevens ultimately was able to overcome the Indians' reluctance and to obtain signatures to the Yakima Treaty on June 9, 1855, after the council's open session had adjourned.

Plans apparently were made at Walla Walla for the hostilities that broke out immediately after Chief Kamiakin returned from the council. After a 3-year period of intermittent campaigns and raids, the Army commander reported, on September 30, 1858, that the "war is closed" and the [7] Indians "have been entirely subdued." Congress, on March 8, 1859, ratified the treaty.

Validity of the Yakima Treaty is not an issue in this case, and the legal consequences of the treaty are irrelevant to division of the monetary award. The Indians, in fact, signed the treaty and, on ratification by Congress, it became law.[9] Subsequent exercise of dominion over the ceded lands and the history of white settlement since 1855, as well as the continuing recognition of the treaty in dealings with Indians at the Yakima Reservation after its ratification, manifest its effectiveness for its major purposes. Coercion of the representatives of the tribes, or duress prior to its execution, did not prevent the extinguishment of the Indian title to the land ceded by the treaty.[10] The Indian Claims Commission did not deem it necessary to utilize its authority to revise the treaty on the ground of duress.[11] The Commission concluded it

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[9] *United States v. Old Settlers*, 148 U.S. 427 (1893); *Sohappy v. Smith*, 302 F. Supp. 899, 905 (1969).

[10] *See Pillager Bands of Chippewa Indians v. United States*, 192 Ct. Cl. 698, 704, 428 F.2d 1274, 1277 (1970).

[11] 25 U.S.C. § 70a (1970).

could best correct the injustice done to the Indians by awarding additional compensation for the lands that had been taken through the [8] instrument of the treaty.[12]

The Yakima Treaty provides a conduit for extinguishment of the Indian title rights of the 11 tribes and it created an entity to accept compensation for the taking of the aboriginal lands. Interpretation of the scope and content of its various provisions are not the subject of this case. In the past, application of the treaty provisions to particular questions have arisen and have been resolved.[13] In the future, interpretation of the treaty provisions may be determined in the context of the factual circumstances that apply when such issues arise.

Conduct of the parties during pretreaty negotiations at the Walla Walla Council and the treaty provisions relative to the tribal constituency of the "Yakima Nation," bear upon the Indians' rejection of the Yakima Treaty. Ethnological information relative to the customs and living conditions of Indians in the Plateau Culture provides an insight into the reasons the Yakima Reservation was not [9] acceptable to some of the Indians purported to be included in the Yakima Nation. Ethnological data also provide a basis for tracing tribal groups during the post-

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[12] 12 Ind. Cl. Comm. 301, 370.

[13] *See, e.g., White v. United States*, 155 Ct. Cl. 127, 293 F.2d 658 (1961), re fishing rights of individual Indians. The Wenatshapam Fishing Reservation, a 6-mile square area situated at the forks of the Pisquouse and Wenatshapam Rivers in the Wenatchi tribal area, provided in article X of the treaty, was sold to the United States in 1894. The proceeds of this sale were paid to the tribal funds administered by the agency at Fort Simcoe on the Yakima Reservation.

treaty period of dispersal and subsequent relocation on reservations other than the Yakima Reservation.

The Yakima Nation, which came into existence on July 9, 1855, had a life of minimal duration, and it has no present existence. The Yakima Nation was an artificial device contrived to open the largest extent of the territories to settlement as soon as possible. The concept of a Yakima Nation, as established by the treaty, did not take into account linguistic differences or Indian tribal identification with particular geographical locations. The treaty was devised in ignorance of, or in disregard to, the identity, location, and leadership of the affected Indian groups.

The 14 separately named Indian tribes and bands confederated into the Yakima Nation spoke differing dialects from three major language groups: Salish,

APPENDIX C

* * *

AGREEMENT WITH THE COLUMBIA AND COLVILLE, 1883.

In the conference with Chief Moses and Sar-sarp-kin, of the Columbia reservation, and Tonaskat and Lot, of the Colville reservation, had this day, the following was substantially what was asked for by the Indians:

Tonasket asked for a saw and grist mill, a boarding school to be established at Bonaparte Creek to accommodate one hundred pupils (100), and a physician to reside with them, and $100. (one hundred) to himself each year.

Sar-sarp-kin asked to be allowed to remain on the Columbia reservation with his people, where they now live, and to be protected in their rights as settlers, and in addition to the ground they now have under cultivation within the limit of the fifteen mile strip cut off from the northern portion of the Columbia Reservation, to be allowed to select enough more unoccupied land in Severalty to make a total to Sar-sarp-kin of four square miles, being 2,560 acres of land, and each head of a family or male adult one square mile; or to move on to the Colville Reservation, if they so desire, and in case they so remove, and relinquish all their claims to the Columbia Reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

The Secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand dollars ($1,000) for the purpose of erecting a dwelling-house for himself; also to construct a saw mill and grist-mill as soon as the same shall be required for use; also that each head of a family or each male adult person shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricultural implements as may be necessary.

And on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addition to all of the above, one thousand dollars ($1,000) per annum during his life.

All this on condition that Chief Moses shall remove to the Colville Reservation and relinquish all claim upon the Government for any land situate elsewhere.

Further, that the Government will secure to Chief Moses and his people, as well as to all other Indians who may go on to the Colville Reservation, and engage in farming, equal rights and protection alike with all other Indians now on the Colville Reservation, and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people. That until he and his people are located permanently on the Colville Reservation, his status shall remain as now, and the police over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent to some point in the locality

of his people, there to be distributed as provided. All other Indians now living on the Columbia Reservation shall be entitled to 640 acres, or one square mile of land, to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected. Or should they move on to the Colville Reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia Reservation.

All of the foregoing is upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing, and confirm this agreement; and also, with the understanding that Chief Moses or any of the Indians heretofore mentioned shall not be required to remove to the Colville Reservation until Congress does make such appropriation, etc.

H.M. TELLER,
Secretary of Interior.
H. PRICE,
Commissioner of Indian Affairs.
MOSES (his x mark),
TONASKET (his x mark),
SAR-SARP-KIN (his x mark).

Supreme Court, U.S.
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No. 94-1567

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
Petitioner,

v.

THE YAKIMA INDIAN NATION, THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS RESERVATION OF OREGON, THE CONFEDERATED TRIBES OF THE UMATILLA RESERVATION, THE NEZ PERCE TRIBE OF IDAHO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	3
CONCLUSION	7

TABLE OF AUTHORITIES

CASES Page

Menominee Tribe v. United States, 391 U.S. 404 (1968) 5
Messinger v. Anderson, 225 U.S. 436 (1912) 4
Morton v. Ruiz, 415 U.S. 199 (1974) 3
The Confederated Tribes of the Colville Reservation v. The Yakima Tribes of Indians of the Yakima Reservation, 204 Ct. Cl. 868, *cert. denied*, 419 U.S. 967 (1974) 6
United States v. Creek Nation, 295 U.S. 103 (1935) 3
United States v. Mitchell, 463 U.S. 206 (1983) 5
United States v. Oregon, 302 F. Supp. 899 (D. Or. 1969) 5
United States v. Washington, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982) 3-4
United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) 4
Williams v. Lee, 358 U.S. 217 (1959) 4

TREATISES

1B *Moore's Federal Practice* (2d ed. 1995) 4-5

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REPLY BRIEF OF PETITIONER

INTRODUCTION

This is a dispute between the major Indian tribes of the Northwest over the thing most important to them, fishing rights. The United States has taken no position in the case. We respectfully suggest that the Court ask the United States to express its views before deciding whether to take this case.

Regardless of those views, however, this is a case that the Court should take. The case is important. The issue is whether a tribe—having by treaty relinquished its ownership of its aboriginal land in return for certain benefits —*sub silentio* loses those benefits by settling on a reservation different from that contemplated in the treaty. There are many such tribes. No case before this has held, or implied, that such action destroyed rights guaranteed by treaty, thus destroying the consideration for the tribe's relinquishment of its land. The ruling of the Court of Appeals is thus both unprecedented, and destructive of promises made by the United States.

The respondents argue that the case turns on complex factual issues. That is not so. The factual issues have been resolved. A legal issue remains. The Court of Appeals held that each of petitioner's constituent treaty tribes had maintained its "identifiable cultural and political characteristics", which allowed "their recognition as constituent tribes of the Colville Confederacy". Pet. at 8a. Moreover, there was no dispute that each tribe was party to a treaty that reserved its fishing rights. Pet. at 60a. Thus the only issue left was the legal issue of whether by not settling on the reservations established in their treaties (and moving closer to their reserved fishing areas), the treaty tribes lost part of the *quid pro quo* under the treaties, the right to fish at their usual and accustomed places. It is clear from the Court of Appeals decision that only that issue guided its decision. Pet. at 10a.

The Court of Appeals has established a rule of law that has never before been applied, that abrogates decades of federal practice, that is contrary to the recognition of the fishing rights of similarly situated tribes (*see* Pet. at pp. 5-7), that takes away the *quid pro quo* for relinguishment of lands by the tribes (and thus exposes the United States to substantial liability), that is inconsistent with the holding of the Court of Claims in a suit between the same tribes, and is plainly wrong.

ARGUMENT

The opposing tribes [1] wish the Court to ignore that no court has ever embraced the rule of law that the failure by a tribe to move to a particular reservation can provide a basis for the loss of treaty rights.[2] Where a decision of a lower court is inconsistent with long established federal policy dealing with Indian affairs it is appropriate for this Court to grant review. *Morton v. Ruiz*, 415 U.S. 199, 201-02, 212-30 (1974) (decision below "inconsistent with long-established policy of the Secretary [of Interior] and of the Bureau [of Indian Affairs]").

In gauging the importance of the question presented, this Court should consider the power exercised by the United States over the treaty tribes during their movement to the Colville Reservation and the trust responsibility of the United States. *See United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935). It was the United States that allowed or forced the treaty tribes to go to the Colville Reservation. It was the United States that assured the treaty tribes that moving to the Colville Reservation and confederation into the Colville Tribes would *not* affect their treaty rights. It was the United States that urged the confederation and later recognized each of the treaty tribes as a constituent member of the Colville Tribes. Now, the United States' courts hold that the tribes in listening to the United States lost their treaty rights.[3] This decision could not be more wrong.

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[1] Only the Warm Springs, Nez Perce and Yakima tribes ("opposing tribes") opposed the Colville Tribes. The states of Oregon, Washington and Idaho and the Umatilla and Shoshone Bannock tribes did not.

[2] The Court of Appeals' attempt to moderate the impact of its decision through its amended order (Pet. at 13a) cannot detract from the fact that no other basis for affirming the District Court is put forward by the Court of Appeals except for the failure of the treaty tribes to move to and confederate on those reservations identified in their treaties. *See* Pet. at 10a.

[3] Contrary to the assertion of the Nez Perce tribe (brief at 9), *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981), *cert.*

The rule developed by the Court of Appeals abrogates the promises made by the United States and diminishes the tribes' status in the federal system. Where, as here, a "doubtful determination" of an important question of Indian law is presented, review by this Court is appropriate. *Williams v. Lee*, 358 U.S. 217, 218 (1959).

The Court should also examine the shifting rationale used by the lower courts to deprive the treaty tribes of their treaty fishing rights. The *District Court* concluded that by merging into the Colville Tribes the treaty rights were lost. This rationale was rejected by the Court of Appeals. Pet. at 10a. Rather, the Court of Appeals, in an initial and then a revised opinion, created a new rationale: the failure to confederate on the reservation originally established for the tribes in their treaties abrogates their treaty rights. *Id.* These shifts do not reflect a thoughtful deliberation of the important issue of how treaty status is established and preserved over time. In a case of such importance regarding the status of Indian tribes, review is appropriate.

The opposing tribes deny the wide impact of the Court of Appeals decision. But it will likely impact all fishing rights cases. For instance, it will impact the law in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) because that case is one of continuing jurisdiction. A court with continuing jurisdiction has the power to reconsider its prior decision at any time. *Messinger v. Anderson*, 225 U.S. 436, 443-45 (1912). A clear change in the law may well compel a lower court with continuing jurisdiction to reconsider its previous and now inconsistent rulings. 1B *Moore's Federal Practice*,

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denied, 454 U.S. 1132 (1982), the unrecognized tribe case, does not address the issue before the Court. That case concerned five tribes never recognized by the United States in any treaty or other action.

¶ 0.404[1] (2d ed. 1995). In addition, numerous other modern federally recognized Indian tribes are configured like the Colville Tribes; confederations of several tribes brought together by historical necessity or the United States. These tribes will be impacted by the Court of Appeals decision.

Finally, the Court should consider the potential of United States liability should the decision of the Court of Appeals be allowed to stand. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 211 n.7 (1983) (the potential of substantial United States liability is a basis for granting review by the Supreme Court). The Court of Appeals' decision abrogates rights which vested in 1855 when the tribes gave up their land in return for other rights including fishing rights. The uncompensated taking of those fishing rights opens the United States to a Fifth Amendment claim. *See Menominee Tribe v. United States*, 391 U.S. 404, 407, 413 (1968).

The Yakima Tribe[4] reminds the Court of the unusual role of the United States in this proceeding. Yakima Brief at 13. The Colville Tribes suggest that this Court pay particular attention to how the United States has approached this case. In 1968, the United States incorrectly advised the District Court that no additional tribes had treaty rights in the case area. *United States v. Oregon*, 302 F. Supp. 899, 904 (D.Or. 1969). The Shoshone Bannock Tribe was later granted the right to intervene in *United States v. Oregon* because it had treaty fishing rights.

The United States' failure in 1968 to name the Colville Tribes is explained because at that time the United

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[4] It bears repeating that the holding of the Court of Appeals finds the fishing rights in question residing in a tribe (Yakima Nation) that never came into existence, Pet. at 21. The Yakima Tribe opposing the Colville Tribes here is, like the Colville Tribes, a modern federally recognized tribe composed of the tribes that moved to its reservation.

States was in the process of trying to terminate the Colville Tribes. The Colville Tribes did not fully overcome the effort to terminate until after the 1969 ruling. In 1968, the United States would have had no interest in asserting rights on behalf of a tribe that was about to be terminated.

The United States took the unusual step in this proceeding of allowing the tribes to wage the battle of treaty status as between themselves. The United States took no position against the Colville Tribes assuming, one would suppose, the fight would be fought within the confines of existing law. Of course, no one anticipated that the Court of Appeals would create a new and substantially different standard upon which to base a determination of treaty status in a proceeding where the United States was silent.

Finally, the Yakima Tribe seeks to diminish both the relevance and the importance of the Court of Claims decision in *The Confederated Tribes of the Colville Reservation v. The Yakima Tribes of Indians of the Yakima Reservation,* 204 Ct. Cl. 868, *cert. denied,* 419 U.S. 967 (1974) ("Claims Case"). But, it is clear that the Claims Case held the Colville Tribes are the modern Indian political entity that represents the aboriginal Chelan, Columbia, Wenatchi, Entiat and Palus tribes. *Id.* at 870. All the opposing tribes accept the fact that the only issue before the courts below was the treaty status of the Colville Tribes. *See* Nez Perce Brief at 5-6 (joined in by the Yakima. *See* Yakima Brief at 4-6). That is the exact issue resolved by the Court of Claims in 1974 and is binding in this case. There is no basis to require the Colville Tribes to litigate their treaty status again in this proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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